Office - Supreme Court, U.S.
FILED
OCT 17 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 557

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervening-Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

STATEMENT AS TO JURISDICTION.

R. J. FLETCHER,
R. E. JOHNSON,
JAMES V. LIONE,
Counsel for Plaintiff-Appellant,
Office & P. O. Address,
219 East 42nd Street,
New York 17, New York.

FULMER LONG,
WILLIAM H. MARX,
Of Counsel.

INDEX.

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	6
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	11
(a) The tariff device of the weekly pickup charge is unlawful *per se*	11
(b) The Interstate Commerce Commission has misapprehended the statutory standards	14
(c) The Commission's negative finding of ability is inadequate	16
(d) The case of *American Trucking Associations* v. *U. S.*, 326 U. S. 77 (1945) is not in point	17
(e) The certificated operation contravenes the National Transportation Policy	17
THE QUESTIONS PRESENTED ARE OF GENERAL IMPORTANCE	18
CONCLUSION	19

APPENDIX.

Opinion of the Court below	A-1
Dissenting Opinion of Judge Murphy	A-7
Report of the Examiner	A-13
Report and Order of Division 1 of the Interstate Commerce Commission	A-29
Order of the full Commission	A-43

CITATIONS.

CASES.

	PAGE
American Trucking Associations v. *U. S.*, 326 U. S. 77 (1945)	17
Automatic Canteen Co. v. *F. T. C.*, 346 U. S. 61, 81 (1953)	14
Books, Drugs, and Cotton Goods from New York to Chicago, 256 I. C. C. 85 (1943)	12
Eastern-Central Assn. v. *U. S.*, 321 U. S. 194, 211 212 (1944)	14
Ex Parte 185, *Increased Express Rates and Charges*, 1953, 289 I. C. C. 249 (1953)	11, 16
Fair Minimum Charges Per Shipment, Herman Forwarding Company, Docket MC C-1345, 54 M. C. C. 828 (1952)	13
Fee Minimum Transfer, Minimum Charges Per Trip, 46 M. C. C. 705, 710 (1947)	11
Florida v. *U. S.*, 282 U. S. 194, 215 (1930)	14
Forwarder Rates Conditioned Upon Aggregates of Tonnage, 264 I. C. C. 225 (1945)	12
L. P. M. Corporation, Extension, Docket No. MC 111015 (1955)	15
Providence Coal Co. v. *Providence and Worcester R. R.*, 1 I. C. C. 363, 367 (1887)	12
U. S. v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499 (1935)	14
United States v. *Hancock Truck Lines*, 324 U. S. 774 (1945)	3
Wearing Apparel—Railway Express Agency, Docket No. 31862 (1957)	12

STATUTES.

	PAGE
49 U. S. C.—Sections set forth in full	
307(a)-207(a) Interstate Commerce Act	3
316(d)-216(d) Interstate Commerce Act	4
National Transportation Policy—preceding 1, 301, 901 and 1001	4
28 U. S. C.	
Sec. 1253	3, 19
Sec. 2284	2
Sec. 2385	2
49 U. S. C.	
Sec. 307(a)	3, 5, 6, 9, 14, 17, 18
Sec. 316(d)	3, 12
Sec. 316(e)	18
National Transportation Policy	3, 6, 18
United States Supreme Court Rules	
13(2)	1
15	1
Federal Rules of Civil Procedure	
52(b)	3
59(e)	3
39 U. S. C.	
Sec. 240a	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervening-Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

STATEMENT AS TO JURISDICTION.

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this its statement of the basis upon which it is contended (1) that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order dismissing the plaintiff-appellant's complaint seeking an injunction suspending, annulling or setting aside certain orders of the Interstate Commerce Commission, granting Intervening-Defendant-Appellee,

hereinafter referred to as United Parcel, a certificate of convenience and necessity to operate a motor truck route, and (2) that the Supreme Court should exercise such jurisdiction in this case.

Opinion Below.

The District Court and the dissenting judge delivered written opinions; and no findings of fact and conclusions of law were separately made. We are informed that these opinions are to be reported in the Advance Sheets of the Federal Supplement issue of October 14, 1957. The Examiner of the Interstate Commerce Commission made a written report. Division I of the Commission adopted and supplemented the Examiner's report, and included formal findings in its report and order. The full Commission ordered that the application of plaintiff-appellant for reconsideration and/or oral argument be denied. The report and order of Division 1 of the Interstate Commerce Commission is reported beginning at page 199 in 68 M. C. C. Copy each of the opinion of the Court below, of the opinion of the dissenting judge, of the report of the Examiner, of the report and order of Division I of the Interstate Commerce Commission and of the order of the full Commission are appended to this Jurisdictional Statement.

Jurisdiction.

The appeal herein is from a final decree made and entered by a United States District Court for the Southern District of New York specially constituted under 28 U. S. C. Sections 2284 and 2385 dismissing plaintiff's application for an injunction suspending, annulling or setting aside an

order of the Interstate Commerce Commission granting United Parcel a certificate of convenience and necessity for the operation of a truck route pursuant to Section 207 of Part II of the Interstate Commerce Act, 49 U. S. C. 307.

The final order appealed from was made and entered on June 6, 1957. Order denying plaintiff-appellant's motion to amend findings and alter judgment under Federal Rules of Civil Procedure 52(b) and 59(e) was made and entered June 19, 1957. Notice of appeal was filed in the United States District Court for the Southern District of New York on August 15, 1957.

The Supreme Court of the United States, by the provisions of Section 1253, Title 28 U. S. C. A., has jurisdiction to review the judgment and order complained of by direct appeal.

It is believed that the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case is sustained by *United States* v. *Hancock Truck Lines*, 324 U. S. 774 (1945).

The statutes of the United States involved are Part II of the Interstate Commerce Act, Section 201 *et seq.*, 49 U. S. C. Section 301 *et seq.* and the National Transportation Policy, 49 U. S. C. preceding Sections 1, 301, 901 and 1001. The particular sections of the Act involved are Section 207(a), 49 Stat. 551, 49 U. S. C. Section 307, and Section 216(d), 54 Stat. 924, 49 U. S. C. Section 316(d), which provide as follows:

> SECTION 207 "(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules,

and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

SECTION 216 "(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsover: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The National Transportation Policy provides:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transporta-

tion subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Questions Presented.

The principal questions presented are:

(1) Where there is reasonable ground to believe unlawful a tariff device which is essential to the ability of an applicant to perform a proposed service for which he seeks certification under Section 207(a) of Part II of the Interstate Commerce Act, and where the lawfulness of such device is challenged, must the Interstate Commerce Commission find the device lawful or require evidence supporting ability absent the device as a condition precedent to certification.

(2) Where there is reasonable ground to believe unlawful a tariff device which is essential to the service for which

public witnesses have testified in support of "convenience and necessity" required by Section 207(a) of Part II of the Interstate Commerce Act, and where the lawfulness of such device is challenged, must the Interstate Commerce Commission find the device lawful or require evidence supporting "convenience and necessity" absent the device as a condition precedent to certification.

(3) Will the certification of a motor carrier by the Interstate Commerce Commission on the basis in whole or in part of rates competitive with Parcel Post and lower than those of competing private enterprise common carriers, where an essential part of such rates is an unlawful tariff device, create a destructive competitive practice contrary to the National Transportation Policy.

Statement of the Case.

By application filed with the Interstate Commerce Commission August 4, 1955, United Parcel, an Ohio corporation, sought authority to operate interstate as a common carrier by motor vehicle. No authority to so operate had been held or sought. However, United Parcel and some of its affiliates had performed similar common carrier service intrastate.

After hearings the duly appointed Examiner made his report and exceptions thereto were filed by protesting plaintiff and certain truckers. Division I of the Interstate Commerce Commission adopted the statement of facts in the Examiner's report, supplemented the same and granted the authority recommended by the Examiner, that is, the right to transport general commodities with certain exceptions from Chicago, Illinois to Davenport, Clinton and Dubuque, Iowa and points in defined areas in Michigan,

Indiana, Illinois and Wisconsin and the return of such shipments from destination points to Chicago over irregular routes, in each instance subject in both directions to the following restrictions:

(a) No service shall be rendered in the transportation of any package or article weighing more than 50 pounds or exceeding 108 inches in length and girth combined, and for the purpose of this restriction, each package or article shall be considered as a separate and distinct shipment, and

(b) No service shall be rendered between retail stores and the branches or warehouses of such stores; or between retail stores and the branches and warehouses thereof, on the one hand, and, on the other, the premises of customers of such stores.

United Parcel urged that its proposed service was competitive primarily with Parcel Post. To support this contention it compared its rates with those of Parcel Post and its main witness testified he knew of no other carrier competing with Parcel Post rate wise (R. 382, 399, 400).

The service for which United Parcel sought authority was identified by it as its "wholesale" service. Its "wholesale" service is designed to discourage the small or infrequent shipper and to appeal to manufacturers, wholesalers, jobbers and distributors, that is, volume shippers (R. 426, 427, 432, 433).

In implementation of this design to appeal to volume shippers only, United Parcel requires those wishing pickup service to execute a contract or so-called "service authorization" which in part provides:

"SERVICE CHARGE

'The Delivery Company will call at the Merchant's place of business for packages once each business day

and the Merchant agrees to pay the Delivery Company a service charge of $2.00 a week.

'All charges for service will be payable weekly.' "

(Exhibit 35, R. *1309*,* evidence 1018, R. 365, 424, 426, 427, 432.)

United Parcel drivers are not supplied with copies of the service authorization and are not permitted to pick up a shipment from a casual shipper who had not signed the service authorization (R. 424).

United Parcel had no plan which it might use in substitution for that which included Exhibit No. 35, the service authorization form (R. 436, 437, 992). United Parcel has performed its wholesale service intrastate Illinois since 1953. More than 99% of its shipments intrastate Illinois are picked up on the basis of its service authorization (R. 426, 427).

The Examiner said in his report (Appendix A-18, A-19):

> "Applicant's ability to provide the service proposed at rates sufficiently low to attract the business from the parcel post system is dependent upon its obtaining a large volume of business and upon it being able to handle such volume in an efficient and expeditious manner."

Division 1 of the Commission said in its report (Appendix A-37):

> "The record reveals that applicant's affiliates have developed a highly efficient system for the distribution of small parcels, and *in order to render this type of service they have established rates on a level with the parcel post system.*" (Emphasis supplied.)

---

* The number in italics identifies the location in the record of the Exhibit.

The public witnesses who testified on behalf of United Parcel upon the issue of public convenience and necessity were solicited on the basis of low rates competitive with Parcel Post (Exhibit 56, R. *1344*, in evidence 1021, R. 521).

Plaintiff urged before the Commission and before the Court that the provision in the service authorization (Exhibit No. 35 before the Commission) quoted above is an unlawful tariff device, that it is the heart of the plan of United Parcel which allows the low rates, that there is no evidence in the record of United Parcel's ability to perform the service absent such device; and therefore there is a lack of evidence supporting the essential finding of ability required by Section 207(a) of the Interstate Commerce Act, 307(a) Title 49 U. S. C.

Plaintiff also urged before the Commission and the Court that there was a lack of evidence supporting the necessary findings of convenience and necessity since the public witnesses were solicited on the basis of low rates competitive with Parcel Post which could be afforded only in connection with a tariff device such as the quotation set forth above from the service authorization.

The Examiner and the Court below held that protestants' objections to the legality of the quoted provision in the service authorization were premature (Appendix A-3, A-4, A-5, A-24).

Division I of the Commission declined to pass upon the validity of the quoted provision in the service authorization, and in its report said (Appendix A-38, A-39):

> "If applicant is granted authority, it will be required to comply with all applicable rules and regulations of the Commission and will not be permitted to engage in practices which are incompatible with its status as a common carrier. Applicant has evinced a willingness to comply strictly with such rules and regulations and to consult with our staff

in preparing its initial tariff. *We are not convinced that it cannot operate in conformity with our requirements affecting motor common carriage and still render an efficient service responsive to the public need.*" (Emphasis supplied.)

There is no evidence in the record that United Parcel is able economically to operate as a true common carrier without the unlawful tariff device and still maintain rates competitive with Parcel Post which the Examiner and the Commission have found essential to the rendition of the proposed service which the Commission finds "responsive to the public need".

Although United Parcel urged that it was primarily competitive with Parcel Post, it is clear that with respect to shipments in the weight brackets between 40 and 50 pounds and in sizes in excess of 72 inches length and girth combined consigned between first class post offices, United Parcel is not competitive with Parcel Post and is competitive with private enterprise carriers. Parcel Post is by statute prohibited from handling shipments between first class post offices weighing in excess of 40 pounds and of a size in excess of 72 inches length and girth combined. Also Parcel Post is prohibited from handling any shipment in size in excess of 100 inches length and girth combined. Section 240a Title 39 U. S. C.

Of the 35 public witnesses who testified, 16 or 45.7% stated that they would divert shipments to United Parcel from plaintiff if and when United Parcel instituted the proposed operation (R. 672, 673, 674, 727, 728, 729, 780, 781, 807, 823, 824, 851-854, 886, 887, 905-907, 943, 948, 949, 959, 960, 963, 972, 976, 981, 984). United Parcel produced 41 public witnesses. It was stipulated that 6 would testify substantially as had the other 35. Express Agency's exposure to loss of business to United Parcel amounts to $926,000

annually (Exhibit 64, R. *1544-1547*, in evidence 1108, R. 1104, 1105, 1107, 1108, 1544-1554, Exhibit 65, R. *1548-1554*, in evidence 1108, R. 1104, 1105, 1107, 1108, 1544-1554, Appendix A-22).

Nevertheless, the Commission found that the minimum charge of plaintiff had the same effect as an embargo on most shipments of small packages (Appendix A-38). Plaintiff's minimum charge was $1.80 (Appendix A-36). Such minimum charge was authorized by the Commission after extensive hearings in Ex Parte No. 185, *Increased Express Rates and Charges, 1953*, 289 I. C. C. 249 (1953).

I.

The questions presented are substantial.

(a)

The tariff device of the weekly pickup charge is unlawful *per se*.

United Parcel's proposal which the Commission has certificated included a flat weekly charge of $2.00 for pickup service. Thereunder a shipper who has occasion to use the service for one package per week must pay $2.00 for the pickup of his one shipment, whereas a shipper who has more than 200 packages per week (each package is a shipment under the proposal) pays less than one cent for the pickup of each shipment.

In effect the charge for pickup service requires a shipper having need for such service but one or two days per week to pay for a service which he does not require and does not wish. In such circumstances the charge is clearly unlawful. See *Fee Transfer, Minimum Charges Per Trip*, 46 M. C. C. 705, 710 (1947). The infrequent shipper should not be required to subsidize the pickup costs of the constant shipper.

Such discrimination which this tariff device creates in favor of the large constant shipper and against the small infrequent shipper is in violation of Section 216(d) of the Act, 49 U. S. C. 316(d). The unjust discriminations brought about by this device have less justification than the rates condemned by the Commission in the cases involving rates based upon aggregates of freight during a given period of time because in such cases no shipper was required to contract and pay for a service he did not use or need. See *Providence Coal Co.* v. *Providence and Worcester R. R.*, 1 I. C. C. 363, 367 (1887); *Books, Drugs, and Cotton Goods from New York to Chicago*, 256 I. C. C. 85 (1943); *Forwarder Rates Conditioned Upon Aggregates of Tonnage*, 264 I. C. C. 225 (1945).

One of the best analyses of the governing principles is found in *Forwarder Rates Conditioned Upon Aggregates of Tonnage*, 264 I. C. C. 225 (1945). The analysis, which includes the declaration that the same rule must be applied for rate making for freight forwarders as common carriers subject to the Act, concludes with the unequivocal pronouncement, at page 233:

> "There is no justification for applying a special rate based upon the aggregate amount of freight forwarded by a patron *during a given period of time*. The Commission has repeatedly held that such rates are in the nature of a discount in favor of large shippers or consignees and, hence, are unlawful." (Emphasis supplied.)

Appellees may urge that the tariff device is lawful and may refer to the case of *Wearing Apparel — Railway Express Agency*, Docket No. 31862, decided by Division 3 of the Interstate Commerce Commission July 5, 1957 and now pending before the full Commission on application for

reconsideration. That case concerned the validity of quantity rates published by the plaintiff "to apply on shipments of wearing apparel when the charges thereon are prepaid and the aggregate weight of one or more shipments is 300 lbs. or more tendered and receipted for at one time, from one shipper at one address and consigned to one or more consignees at one or more destinations." Division 3 of the Commission held the rates valid because of relative cost savings due to the tariff provision that traffic must be turned over to the carrier at one time and at one place and because the rates enabled the plaintiff to regain traffic that had been diverted to competitors. Compare *Minimum Charges Per Shipment, Herman Forwarding Company*, Docket MC C-1345, 54 M. C. C. 828 (1952).

There are important and controlling differences between the rates in Docket No. 31862 and the traffic device in the instant case. In Docket No. 31862 no shipper purchases any service he does not require; in the instant case a shipper needing pickup service but one day in a week must pay for such service for each of the five business days in the week. In Docket No. 31862 Railway Express Agency sought to *regain* traffic by lower volume rates; in the instant case United Parcel seeks on the basis of low rates to invade a field already occupied by authorized carriers. In Docket No. 31862 the rates are dependent upon the weight of aggregated shipments tendered at one time and place and therefore the charges for each shipment are known at the time of tender; in the instant case the charges for each shipment are not known until it can be determined what volume moved under the $2.00 per week pickup charge.

In any event, United Parcel should not have been certificated in the absence of a finding after a full hearing that the tariff device was lawful.

(b)

The Interstate Commerce Commission has misapprehended the statutory standards.

The ultimate findings required of the Commission by the statute must be supported by basic findings of fact supported by substantial evidence. Compare *Eastern-Central Assn.* v. *U. S.*, 321 U. S. 194. 211, 212 (1944); *Florida* v. *U. S.*, 282 U. S. 194, 215 (1930); *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61, 81 (1953); *U. S.* v. *Chicago M. St. P. & P. R. Co.*, 294 U. S. 499 (1935).

Under Section 207(a) of the Interstate Commerce Act, [49 U. S. C., Sec. 307(a)] Congress has prescribed as an ultimate finding prerequisite to the certification of a common carrier by motor vehicle that the applicant must be "able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder."

Where, as here, it appears from the basic findings that ability to furnish the service proposed depends upon ability to operate at low rates competitive with Parcel Post, there must be substantial evidence in the record as a whole supporting a basic finding that applicant can operate the service proposed at a rate level competitive with Parcel Post and at least meet costs. Obviously, if the service were operated at a deficit it could not last and, therefore, would not meet the public need said to have been evidenced. The only evidence in the record supporting such basic finding is the experience United Parcel has had intrastate; but such experience has been solely in service tied to and dependent upon a tariff device exactly like that here proposed which plaintiff urges is unlawful (R. 432, 433, 992, Appendix A-40). There is no substantial evidence supporting a basic finding that United Parcel can successfully perform

the service proposed absent the unlawful device. Therefore, there is a lack of evidence that United Parcel is able to operate the service proposed.

Keeping in mind that United Parcel does not furnish its drivers with blank copies of the so-called service authorization and that pickup service is furnished only those who sign the service authorization which includes the $2.00 per week charge for pickup service each business day regardless of need, it is clear that practically United Parcel does not serve on call like a true common carrier such as plaintiff, but does serve on contract like a true contract carrier. If United Parcel were required to serve on call rather than on contract its unit expense would be greatly increased as it would be obligated to serve at the same charge for each pickup call the infrequent or casual shipper as well as the daily multiple shipper, and it would lose the economic advantage of carefully routing its pickup service a week in advance. It is respectfully submitted that United Parcel cannot compete as a true common carrier rate wise with Parcel Post. At least there is no evidence in the record that it can.

This is not the usual case. Implicit in the basic finding of the Commission that "in order to render this type of service they have established rates on a level with the parcel post system" is the conclusion that the predominant factor in the service appealing to the public is low rates. As stated in *L. P. M. Corporation*, Extension, Docket No. MC 111015 and as quoted in Judge Murphy's dissenting opinion:

> "Although the rates and charges for a proposed motor carrier operation are not in issue in an application proceeding, the economics of such an operation are definitely in issue. Sufficient facts should be shown to establish that adequate revenues will be earned by the applicant, that its operating costs will

not exceed the prospective revenues and that the proposed operation can be conducted in a feasible, economical and efficient manner under the Commission's rules and regulations."

Plaintiff's own rates, including its minimum of $1.80 per shipment, were approved by the Interstate Commerce Commission on the basis of cost studies after extensive hearings. Ex Parte No. 185, *Increased Express Rates and Charges, 1953*, 289 I. C. C. 249. Plaintiff has not been able to compete rate wise with Government operated and subsidized Parcel Post.

(c)

The Commission's negative finding of ability is inadequate.

In lieu of a positive basic finding that United Parcel is able to perform the service at lawful rates competitive with Parcel Post the Commission said (Appendix A-38, A-39):

> "If applicant is granted authority, it will be required to comply with all applicable rules and regulations of the Commission and will not be permitted to engage in practices which are incompatible with its status as a common carrier. Applicant has evinced a willingness to comply strictly with such rules and regulations and to consult with our staff in preparing its initial tariff. *We are not convinced that it cannot operate in conformity with our requirements affecting motor common carriage and still render an efficient service responsive to the public need.*" (Emphasis supplied.)

Such a negative expression needs no support in the record. In effect it attempts to shift the burden of proof with respect to applicant's ability to perform the service lawfully from the applicant to the protestants contrary to the statutory standard.

(d)

The case of *American Trucking Associations* v. *U. S.*, 326 U. S. 77 (1945) is not in point.

The Court in its opinion stated that the Commission's action in refusing to consider the validity of the $2.00 per week charge was in accord with the Supreme Court's statement in *American Trucking Associations* v. *United States*, 326 U. S. 77, at 86 reading (Appendix A-4):

> "• • • It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of Sec. 217 of part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of Sec. 220 of the same part to which the other motor carriers are subject. *These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.*" (Italics added.)

The alleged improprieties in the *American Trucking Associations* case did not directly and materially affect the ability of the applicant in that case to perform the service or to conform to any of the conditions specified in Section 207(a) of the Interstate Commerce Act, 49 U. S. C. 307. It is respectfully submitted that in the instant case the unlawful tariff device directly affects the rates which United Parcel is able to charge and, as the Examiner and the Commission have held, low rates are essential to applicant's ability to provide the service proposed.

(e)

The certificated operation contravenes the National Transportation Policy.

The operation includes cut rates substantially below the rates of all other private enterprise carriers in the area.

Such cut rates can be maintained economically only on the basis of the unlawful tariff device which attracts the multiple shipper and embargoes the infrequent or casual shipper whose shipments can be handled only at a high unit cost. Such cut rates result in destructive competition contrary to the National Transportation Policy "to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices" (National Transportation Policy, 49 U. S. C. Preceding Sections 1, 301, 901 and 1001).

II.

The questions presented are of general importance.

The Court below held that it was unnecessary for the Commission to pass upon the legality of the tariff device of the $2.00 charge per week and that the Express Agency still could challenge the legality of the United Parcel's rate schedules under Section 216(e) of the Act, 49 U. S. C. 316(e). The Court said:

> "Until this administrative remedy has been exhausted, complaint to the Courts is premature."

If this Court sustains the position of the Commission and the Court below that the issue of the lawfulness of the tariff device is prematurely raised, it is submitted that support for a certificate to operate as a motor carrier may be solicited and built upon an offering of low rates which the applicant knows or should know cannot be sustained lawfully. In such circumstances protestants are foreclosed from a hearing on a proper basis, ordinary requirements of fairness are contravened and the purpose of Congress expressed in Section 207(a) of the Act is thwarted.

The application here involved is the first by United Parcel or any of its affiliates for authority to operate interstate as a common carrier—but it is not the last. There is now pending before the Commission, I. C. C. Docket No. MC 116200, a similar application made by United Parcel Service of New York, Inc. on the basis of a similar tariff device for authority to serve New York and Boston shippers in territory comprising most of New England and parts of the States of New York and New Jersey.

Conclusion.

Wherefore, it is respectfully submitted (1) that this Court has jurisdiction of this appeal under Section 1253, Title 28 U. S. C.; (2) that this Court may find this case an appropriate one for reversal without further argument and (3) that this case be referred back to the United States District Court for the Southern District of New York with instructions to annul or set aside the said orders of the Interstate Commerce Commission, or to suspend said orders and remand the cas to the Interstate Commerce Commission for a determination of the legality of the $2.00 per week pickup charge on the present record or upon the present record and such additional evidence as may be received after reopening the case and for the denial of United Parcel's application in the event the said tariff device of the $2.00 per week pickup charge is found unlawful.

Respectfully submitted,

R. J. Fletcher,
R. E. Johnson,
James V. Lione,
Counsel for Plaintiff-Appellant.

Fulmer Long,
William H. Marx,
of Counsel.

APPENDIX.

Opinion of the Court Below.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

RAILWAY EXPRESS AGENCY, INCORPORATED, Plaintiff, v. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.	Civil Action No. 119-29

Action to review and set aside two orders of the Interstate Commerce Commission. Complaint dismissed.

FULMER LONG, JAMES V. LIONE and WILLIAM H. MARX, Attorneys for Plaintiff.

ROBERT W. GINNANE, General Counsel, and H. NEIL GARSON, Assistant General Counsel, for Interstate Commerce Commission.

VICTOR R. HANSEN, Assistant Attorney Gen., JAMES E. KILDAY and MAURICE A. FITZGERALD, Attorneys, Department of Justice, PAUL WILLIAMS, United States Attorney and HAROLD J. RABY, Ass't U. S. Attorney, for United States of America.

PROSKAUER ROSE GOETZ & MENDELSOHN, of New York City and

SCHNADER, HARRISON, SEGAL & LEWIS, of Philadelphia, Pa., Attorneys for United Parcel Service, Inc., Intervenor; BERNARD G. SEGAL, IRVING R. SEGAL, S. HARRISON KAHN and JACOB IMBERMAN, of Counsel.

Opinion of the Court Below.

Before:

SWAN, Circuit Judge, and MURPHY and EDELSTEIN, District Judges.

SWAN, Circuit Judge:

This case is before a three judge court convened pursuant to applicable statutory provisions.[1] It has been heard upon the complaint, the answers thereto, the record made in an administrative proceeding before the Interstate Commerce Commission, and the briefs and arguments of counsel.

The action seeks annulment or suspension of two orders of the Commission, dated respectively September 24, 1956 and January 23, 1957, entered in a proceeding entitled *United Parcel Service, Inc., Common Carrier Application*, Docket No. MC-115495. In this proceeding, commenced in August 1955, United Parcel applied for a certificate of public convenience and necessity, pursuant to 49 U. S. C. A. §307(a), to operate as a common carrier by motor vehicle of general commodities, with certain exceptions, over described irregular routes between Chicago, Illinois, and certain points in Iowa, Illinois, Indiana, Wisconsin and Michigan.[2] Protests to the granting of such authority were filed by Railway Express Agency and several motor common carriers. The application was thereafter referred to an examiner who, after extensive hearings, recommended

---

[1] 28 U. S. C. A. §§1136, 1398, 2321-2325.

[2] 49 U. S. C. A. §307(a) provides:

"Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * *"

that a certificate be granted. Exceptions to the examiner's report were filed by protestants but Division I of the Commission unanimously adopted the examiner's recommendation and ordered that upon fulfillment of certain conditions including the filing by United Parcel of a proper tariff, the certificate be issued. 68 M. C. C. 199,206. This is the order of September 24, 1956. The second order complained of denied Railway Express Agency's petition to the full Commission for a reconsideration of the order of Division I. Thereafter United Parcel filed a tariff to become effective April 1, 1957 to which Railway Express Agency filed a protest. The Commission declined to allow the protest, advising, however, that its declination "does not constitute approval of the protested schedules." The tariff became effective April 1, 1957 without Commission action. On the same date a certificate of public convenience and necessity was issued to United Parcel.

The present action was commenced by the issuance of summons March 28, 1957. The complaint alleges that the orders are illegal because a "necessary ingredient" of United Parcel's proposed operation is a charge of $2.00 per week for a pick-up call each business day regardless of the shipper's need or demand for such service.[3] This is asserted to constitute an unlawful discrimination against shippers who require transportation less than five days per week, contrary to 49 U. S. C. A. §316(b) and (d). Neither the examiner nor Division I passed upon this contention. The

---

[3] The tariff filed by United Parcel incorporated this allegedly unlawful discriminatory provision in the following form:

> "Note 1: When pick-up service is requested in writing and furnished, a service charge of $2.00 per week shall apply in addition to the rates set forth in this item and the carrier will call at the consignor's place of business once each business day to pick up packages for delivery to all points served without special pick-up request and whether or not any packages are available for delivery. (Packages tendered at the carrier's receiving stations will not be subject to such additional charges)."

examiner's report states that the objection to "the charging of a fixed amount weekly for scheduled pick-up service • • • [is] premature," and "if applicant is granted a certificate it will be expected to publish and maintain reasonable rates and charges for all services performed." Division I said: "If applicant is granted authority, it will be required to comply with all applicable rules and regulations of the Commission and will not be permitted to engage in practices which are incompatible with its status as a common carrier. • • • We are not convinced that it cannot operate in conformity with our requirements affecting motor common carriers and still render an efficient service responsive to the public need."

While conceding that ordinarily rates are not a relevant factor in certificate proceedings, the plaintiff argues that the Commission's action in refusing to consider the validity of the $2.00 per week charge "was arbitrary and capricious and therefore the orders of the Commission should be set aside." We see nothing arbitrary in the Commission's action. It accords with the Supreme Court's statement in *American Trucking Associations* v. *United States*, 326 U. S. 77, at 86:

> "• • • It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of §217 of part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of §220 of the same part to which the other motor carriers are subject. *These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.*" [Italics added.]

Nor has the Commission's action deprived Railway Express Agency of opportunity to challenge the legality of United Parcel's rate schedules, pursuant to section 316(e) of the

Act.[4] Until this administrative remedy has been exhausted, complaint to the courts is premature. See *National Water Carriers Ass'n* v. *United States* (S. D. N. Y.), 126 F. Supp. 87, 90.

The report and order of Division I made the following findings:

> "We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of the commodities, from and to the points, and subject to the restrictions described in the appendix hereto.
>
> We further find that the holding by applicant at the same time of the certificate authorized to be issued herein and of the permit heretofore issued to it will be consistent with the public interest and the national transportation policy.
>
> We further find that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and to our rules and regulations thereunder; * * *"

These findings, if supported by the administrative record, are sufficient to require the order to be upheld. See *Newtex S. S. Corp.* v. *United States* (S. D. N. Y.), 107 F. Supp. 388, affirmed, 344 U. S. 901.

Plaintiff contends that the testimony of public witnesses solicited on the basis of low rates is not sufficient to establish the convenience and necessity required by the

---

[4] "Any person * * * may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title. * * *"

statute. But the Commission did not base its finding of convenience and necessity on the specific rate structure proposed by the applicant. On the contrary it found that neither plaintiff nor other carriers were meeting, or were fit, able and willing to meet, the shippers' needs for the particular service proposed by the applicant, and it expressly rejected the protestants' argument that the public witnesses favored the application out of a desire for lower rates.[5] The opinion in *Atlanta-New Orleans Motor Freight* case, D. C. N. D. Ga., August 10, 1953 (not published) quoted in the defendants' brief seems closely in point. We think it apparent from the reports of the examiner and Division I that the certificate was granted to United Parcel on the basis of evidence showing a more efficient service, at a lower cost and of a type not presently offered to shippers.

Accordingly the complaint is dismissed.

THOMAS W. SWAN
U. S. D. J.

DAVID N. EDELSTEIN
U. S. D. J.

Dated: June 6th 1957

Judgment entered June 6, 1957.

HERBERT A. CHARLSON,
Clerk.

---

[5] United Parcel Service, Inc., Common Carrier Application, 68 M. C. C. 199, at 203-4.

Dissenting Opinion of Judge Murphy.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

RAILWAY EXPRESS AGENCY, INCORPORATED, Plaintiff,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

Civ. 119-29.

Opinion.

MURPHY, D. J., dissenting.

The issuance of a certificate is dependent upon a finding that the "applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder." 49 U. S. C. §307. Such a finding was made in the instant case but plaintiff alleges that there is no evidence to support it. I agree.

The Examiner found, and Division I agreed, that the service proposed to be rendered by United Parcel is "required by the present or future public convenience and necessity." According to the Examiner the service offered by the applicant "has been designed and developed to accomplish the expeditious delivery of small packages of the type for which Parcel Post is now generally utilized, at rates comparable with Parcel Post * * *" and he found that "the record establishes an urgent need on the part of the shipping public for a small package service such as that proposed and which is now effectively available only through the medium of the Parcel Post System." These

findings are not here disputed. Both from these excerpts, and a reading of the reports as a whole, it is abundantly clear that the requisite finding of convenience and necessity depended chiefly upon United Parcel's proposal to operate on the basis of Parcel Post rates. Thus, while rates are not usually relevant or pertinent in application proceedings, in the instant case rates were the predominant factor which led to the issuance of a certificate.

Turning now to the question of fitness and ability, it becomes clear that the necessary finding must go further than a simple determination that United Parcel is fit, willing and able to pick up, transport and deliver packages. The finding now must be to the effect that United Parcel is fit, willing and able to perform the above-mentioned physical operations at Parcel Post rates and in conformity with the Commission's rules and regulations.

An integral part of the applicant's proposal is the practice of charging shippers $2 a week for pick-up service five days a week whether or not the shipper requires a pick-up on any particular day. Shippers who do not wish or need daily pick-ups must either pay the flat rate or deliver their packages to applicant's terminal themselves. Only 1% of applicant's business is done by the latter method. Plaintiff urges that this is illegal and in violation of 49 U. S. C. §316(d). The Examiner rejected this contention as being prematurely raised and asserted that the applicant would be required to, and indeed had agreed to, comply with the Commission's rules and regulations with respect to rates and charges for services performed. Earlier in the report he assumed that the applicant would conduct his proposed operations in a manner similar to the intrastate operations presently conducted in the Chicago area, i.e., the flat $2 a week pick-up charge would be carried over into the interstate operations. Division I agreed. However, the order denying plaintiff's petition to the full Commission for a reconsideration stated that "such denial does not constitute approval of the protested schedules."

It is apparent plaintiff's objection was treated as a rate question and therefore inappropriate to an application proceeding.

While it is true plaintiff's objection raises a question of rates, it goes far deeper than that. This is not the usual case since the main justification for issuing the certificate was based on the rates United Parcel proposed to charge. "Although the rates and charges for a proposed motor carrier operation are not in issue in an application proceeding, the economics of such an operation are definitely in issue. Sufficient facts should be shown to establish that adequate revenues will be earned by the applicant, that its operating costs will not exceed the prospective revenues and that the proposed operation can be conducted in a feasible, economical and efficient manner under the Commission's rules and regulations." L. P. M. Corporation Extension, Docket No. M. C. 111015.

The importance of plaintiff's objection becomes clear when we examine the reports with reference to United Parcel's fitness and ability. The Examiner's sole finding on the question of applicant's financial ability to perform at Parcel Post rates is "All of these companies' are in good financial condition. A pro forma balance sheet giving effect to the proposed merger of the Illinois company into applicant indicates assets of almost $3,000,000 and a similar statement giving effect to all the above described mergers indicates assets of almost $4,000,000." Surely, an asset figure without reference to liabilities or net income is completely meaningless. The Division I report goes into slightly more detail and finds that applicant had assets of $480,603, and net income for the first nine months of 1955 of $15,125. It concludes by saying United Parcel is "fit and able, financially and otherwise, to perform the proposed operation" and that it was "not convinced that it cannot operate in conformity with our requirements and still render an efficient service responsive to the public need."

Dissenting Opinion of Judge Murphy.

Both findings of fitness and ability are predicated upon applicant's past use of the complained of pick-up charge, and on the presumed use of the same allegedly illegal charge in the future. There is not a shred of evidence in the record pertaining to United Parcel's financial ability to perform at low rates without this charge.

There is, however, considerable financial data in the record. The figures are most complete with respect to Illinois. It makes daily pick-ups from 1294 consignors. Multiply this by $2 a week for 52 weeks and it appears that $134,576 of its total 1955 revenue of $189,433[2], or better than 70% of it is obtained by use of the allegedly illegal practice. Consider, then, that Illinois would net, without the pick-up charge, only $54,857 after gross revenues of $6,991,964 and assets of $2,292,438, and it becomes obvious that a determination of the legality or illegality of the pick-up charge vitally affects the ability to perform. The figures with respect to the applicant are even more striking—assets of $480,603, gross revenue $1,800,192, net income without the pick-up charge, $6,053. The slightest rise in wages or other operating expenses could wipe its profit out completely. Applicant would then be forced either to discontinue operations or to raise its rates above the Parcel Post level, although the main justification for convenience or necessity rests on its proposal to operate at Parcel Post rates. Examined in the light of these considerations it is obvious that the Commission was arbitrary and capricious in declining to determine the legality of the pick-up charge. It is logically impossible for the Commission to make a finding of ability to perform in conformity with the regulations when it refuses to interpret these regulations with respect to a practice whereby the applicant derives 70% of its revenues.

This court has jurisdiction to review the order of the I. C. C. to determine whether such order has support in the law and in the record. U. S. *v.* Pierce Auto Lines, 327 U. S. 515 (1945).

Dissenting Opinion of Judge Murphy.

Unless and until the Commission determines the legality of the complained of practice it is impossible for us to tell if the record supports a finding of financial ability to perform in accordance with the rules and regulations. While it is true Railway Express can challenge the legality of United Parcel's rate schedule pursuant to §316(e) of the Act, success in that proceeding would still have no effect on the issuance of the certificate. Yet if Railway Express is successful there is no evidence in the record to support the Commission's finding.

Accordingly, I would remand the case to the Commission for a determination of the legality of the pick-up charge. In the event said charge is found to be illegal the Commission should be directed to reconsider the applicant's ability to perform at Parcel Post rates on the present record or to reopen the hearings for further testimony.

THOS. F. MURPHY,
U. S. D. J.

Dated, New York, N. Y., June 4, 1957.

FOOTNOTES

	Applicant	Illinois	Consolidated
Assets	$480,603	$2,292,438	$2,773,041
Gross Revenue	$1,350,144—$1,800,192*	$5,243,973—$6,991,964*	$6,594,117—$8,792,153*
Net Income	$15,125—$20,165*	$142,075—$189,433*	$157,200—$209,598*
Net Income less pick-up Charge	$6,053[b]	$54,857[a]	$60,910[b]

	Milwaukee	Cleveland	Consolidated
Assets	$284,492	$767,230	$3,824,763
Gross Revenue	$864,647—$1,152,862*	$934,613—$1,246,150*	$8,393,337—$11,191,168*
Net Income	$17,171—$22,894*	$16,337—$21,782*	$190,708—$254,274*
Net Income less pick-up Charge	$6,871[b]	$6,536[b]	$74,317[b]

* Projected yearly figures based on the nine month figures contained in the record.

[a] Computed as follows: Projected yearly income of $189,433 less income from pick-up charge—1294 consignors at $2 a week for 52 weeks or $134,576.

[b] Computed by deducting 70% of projected net income. This figure was used, in the absence of any others, because it approximated the percentage of net income derived from the pick-up charge determined in the case of Illinois.

[1] The proposal contemplated a merger of United Parcel of Illinois, Milwaukee and Cleveland into the applicant.

Report of the Examiner.

No. MC-115495

UNITED PARCEL SERVICE, INC., COMMON CARRIER APPLICATION

Decided

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of general commodities, with certain exceptions, between Chicago, Ill., on the one hand, and, on the other, Davenport, Dubuque, and Clinton, Iowa, and points in specified portions of Illinois, Indiana, Wisconsin, and Michigan, over irregular routes, subject to certain restrictions. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

S. HARRISON KAHN, BERNARD G. SEGAL, IRVING R. SEGAL and PRESTON DAVIS for applicant.

ROBERT E. DES ROCHES, JOHN P. MCMAHON, L. H. RISTOW, CARL L. STEINER, EDWARD G. BAZELON, GLENN W. STEPHENS, RICHARD F. HAHN, FULMER LONG, ELMER F. SLOVACEK, EUGENE L. COHN, JUDSON B. ROBB, WALTER F. JONES, JR., ROBERT H. LEVY, and BERNARD G. COLBY for protestants and interveners in opposition to the application.

H. L. SHAFFER for Dubuque Packing Company.

Report and Order.

Recommended by FRANK R. SALTZMAN, Examiner.

By application filed August 4, 1955, as amended, United Parcel Service, Inc., of Cincinnati, Ohio, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by

motor vehicle, (1) of general commodities, except those of unusual value, dangerous explosives, household goods as defined by the Commission, commodities in bulk, those requiring special equipment, and those injurious or contaminating to other lading, from Chicago, Ill., and points in Illinois and Indiana within 50 miles thereof, to Davenport, Dubuque, and Clinton, Iowa; points in Allegan, Barry, Berrien, Branch, Calhoun, Cass, Eaton, Ingham, Jackson, Kalamazoo, Kent, Muskegon, Ottawa, St. Joseph, and Van Buren Counties, Mich.; points in Adams, Allen, Benton, Blackford, Boone, Carroll, Cass, Clinton, DeKalb, Delaware, Elkhart, Fountain, Fulton, Grant, Hamilton, Hancock, Hendricks, Henry, Howard, Huntington, Jasper, Jay, Kosciusko, La Grange, Lake, La Porte, Madison, Marion, Marshall, Miami, Montgomery, Newton, Noble, Porter, Pulaski, Randolph, St. Joseph, Starke, Steuben, Tippecanoe, Tipton, Wabash, Warren, Wayne, Wells, White, and Whitley Counties, Inc.; points in Boone, Bureau, Carroll, Champaign, Cook, DeKalb, De Witt, Du Page, Ford, Grundy, Henry, Iroquois, Jo Davies, Kane, Kankakee, Kendall, Knox, Lake, LaSalle, Lee, Livingston, Logan, Macon, Marshall, McHenry, McLean, Ogle, Peoria, Piatt, Putnam, Rock Island, Sangamon, Stark, Stephenson, Tazewell, Vermilion, Whitside, Will, Winnebago, and Woodford Counties, Ill.; and points in Brown Calumet, Dane, Dodge, Fond du Lac, Jefferson, Kenosha, Manitowoc, Milwaukee, Outagamie, Ozaukee, Racine, Rock, Sheboygan, Walworth, Washington, Waukesha, and Winnebago Counties, Wis., and (2) of returned shipments of the same commodities, which applicant has previously delivered, from the above-specified destinations to the above-specified origin points, over irregular routes in each instance, and subject to the following restrictions: (a) *no service shall be rendered in the transportation of any package or article exceeding 50 pounds in weight or 108 inches in length and girth combined,* (b) each package or article shall be considered as a separate and dis-

tinct shipment, and (c) no service shall be rendered in the transportation of such commodities sold by department stores and specialty shops between such stores and shops and their customers, or between such stores and shops and branches and warehouses thereof, or between such stores' or shops' branches and warehouses and such stores' and shops' customers.

In accordance with the provisions of the Interstate Commerce Act, the application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held at Chicago, November 28 through December 2, 1955, and on December 5, 1955. The application is opposed by the Railway Express Agency, Inc., and a number of motor common carriers operating in the affected territory. The intervention of Dubuque Packing Company was withdrawn during the course of the proceedings.

Applicant is an Ohio corporation, organized in 1934, and it is affiliated with a number of commonly controlled corporations doing business throughout the country under the "United Parcel Service" name. The several affiliated companies have specialized for a number of years in the delivery of small parcels or packages. Two distinct types of service are provided. One consists of the delivery of packages to the customers of retail stores, and the other of the delivery of packages for manufacturers, wholesalers, and distributors to their customers, which are normally retail establishments. For convenience of discussion, the two types of service will hereinafter be referred to as the retail service and the wholesale service, respectively. This particular applicant now conducts both types of service. Its wholesale service, which is conducted under common-carrier authority issued by the Public Utilities Commission of Ohio, is confined to intrastate deliveries radiating from Cincinnati. Its retail service, which is performed under contract-carrier authority issued by the Ohio Commission

and also a permit issued by this Commission, consists of a delivery service for certain Cincinnati retail stores to points in described areas of Ohio, Kentucky and Indiana. Its present permit, in No. MC-13426, authorizes the transportation (1) of such commodities as are sold by retail department stores, between Cincinnati and points in a described area of Kentucky, and (2) of new furniture and household furnishings, between Cincinnati and points in Indiana and Kentucky, with the service in both instances being restricted to one under separate and individual contracts or agreements with persons who operate retail department stores and specialty shops.

Insofar as particularly pertinent herein, applicant is under common control with United Parcel Service of Illinois, Inc., of Chicago, which company is now engaged in performing an intrastate wholesale service radiating from Chicago, under authority of a certificate of public convenience and necessity issued by the Illinois Commerce Commission, an intrastate retail service, under Illinois contract-carrier authority, and an interstate wholesale and retail service within the Chicago commercial zone. It is proposed to merge the Illinois corporation into applicant, and the interstate wholesale service here proposed will actually be performed as an extension of the intrastate service now performed out of Chicago by the Illinois corporation. Certain other corporate simplification proceedings are also in contemplation which will result in the merger, into applicant of United Parcel Service of Milwaukee, which conducts wholesale and retail services in the intrastate delivery of packages out of Milwaukee, Wis., and United Parcel Service of Cleveland, Inc., which performs similar operations out of Cleveland, Ohio. All of these companies are in good financial condition. A pro forma balance sheet giving effect to the proposed merger of the Illinois company into applicant indicates assets of almost $3,000,000, and a similar statement giving effect to all of

the above-described mergers indicates assets of almost $4,000,000.[1]

The basic type of vehicle to be utilized in the proposed service is a small panel car, especially designed for parcel delivery work, with a capacity of less than 400 cubic feet. As of October 31, 1955, applicant had 132 of such units in operation and the Illinois corporation had 381, for a total of 513. In addition, the two corporations had over 100 similar cars of somewhat larger capacity and over 300 other units of miscellaneous equipment, including 116 so-called package trailers, which are utilized in consolidating operations in conjunction with the smaller panel cars. All vehicles will be operated by uniformed personnel.

The service now conducted by the Illinois corporation out of Chicago, which it is here proposed to extend into adjoining interstate areas, has been designed and developed to accomplish the expeditious delivery of small packages of the type for which Parcel Post is now generally utilized, at rates comparable with those of Parcel Post, but with certain conveniences and advantages to shippers which are not obtainable under the Parcel Post system. The size and weight limitations contained in the application (50 pounds and 108 inches in length and girth combined) were determined from a study of the sizes and weights of packages now received by applicant and affiliated companies for delivery in similar operations. Although the present Illinois intrastate service provides more liberal weight and size limitations than those here proposed, experience has indicated in connection with that operation that almost all of the packages transported have weighed less than 50 pounds. In 1955, 40 percent of all packages transported

[1] Other operating companies under common control are United Parcel Service, of Los Angeles, Calif.; United Parcel Service of New York, Inc.; United Parcel Service of Detroit, Inc.; United Parcel Service of Minnesota; United Parcel Service of Arizona; United Parcel Service of Pennsylvania; and United Parcel Service of Portland, Oreg.

weighed less than 5 pounds; 74 percent weighed less than 15 pounds; and 89 percent weighed less than 25 pounds; for an overall average of 11 pounds per package.

Most of the territory embraced in the instant application lies in Chicago Parcel Post zones 1 and 2, with a small portion lying in zone 3. Between first class post offices, the Parcel Post limitations are 40 pounds and 70 inches in length and girth combined for shipments moving between points in zones 1 and 2, and 20 pounds and 70 inches for shipments moving to or from points in zone 3. Between all other classes of post offices, in all zones, the limitations are 70 pounds and 100 inches in length and girth combined. It will be noted, therefore, that the weight and size limitations here proposed by applicant are somewhat more liberal than those maintained by Parcel Post in the case of movements between first class post offices, and somewhat less liberal than the Parcel Post restrictions in the case of movements between lesser post offices, particularly in respect of weight. In addition, to these differences in size and weight limitations, the proposed service is said to be more attractive than Parcel Post in that (1) scheduled daily pickups are made at the premises of the consignor, (2) dependable next-day delivery is made in the entire area served, (3) written proof of delivery is obtained in all instances from the consignee, (4) facilities are provided for the prompt tracing of shipments, even in response to telephone calls, (5) prompt settlement of loss and damage claims is made without burdensome "red tape" and delays, (6) personal checks are accepted in payment of C.O.D. charges, (7) when initial delivery cannot be made, subsequent deliveries are attempted, and refused or undeliverable shipments are returned to the consignor without additional cost, and (8) free insurance is provided within certain limits.

Applicant's ability to provide the service proposed at rates sufficiently low to attract the business from the Parcel Post system is dependent upon its obtaining a large volume of business and upon its being able to handle such volume

in an efficient and expeditious manner. Based upon its past experience, or the experience of its affiliates, it has determined that it will have no difficulty in meeting the volume requirement, and in present operations in the Chicago area there has been developed an elaborate system for handling small packages which has proved both efficient and economical. As the same time of the hearing herein, the wholesale operation in the Chicago area was making daily pickups from 1,300 consignors and handling approximately 15,000 packages a day. Immediately upon the institution of the interstate service here proposed, it is expected that the number of packages offered daily will be increased by about 8,500.

Representatives of some 41 manufacturers and distributors having occasion to ship small packages from points in the Chicago area to points within the scope of the application appeared in support of the proposal. In general, these firms now utilize the existing intrastate service of applicant's affiliate out of Chicago, and desire the extension of such service to the adjoining interstate territories covered by the application. Deliveries of their small packages in such interstate areas are now being accomplished primarily by Parcel Post, but some use is also being made of the services of Railway Express Agency and motor common carriers, particularly in respect of packages which exceed Parcel Post limits as to size or weight. Within the size and weight limits of the instant application, the use of railway express service has been quite limited and the use of motor common carrier service has been almost nil. Although some dissatisfaction is expressed concerning the service received from the express agency, particularly as to excessive delivery time, the primary objection of the supporting shippers to both forms of transportation appears to lie the minimum rate factor, which renders the use thereof prohibitive on small packages. In the territory here considered, the express agency maintains a minimum charge of $1.80 per shipment and the motor common carriers a

minimum of $3. These minima, whether justified or not, have driven most of the small-package delivery business to the Parcel Post system. For example, one of the supporting shippers dispatches paper dress patterns, averaging three pounds per shipment, from Chicago to department stores in the territory. Under present Parcel Post rates, the charges for each of such shipments is 31 cents, for distances up to 150 miles. It is not too difficult to understand why this shipper does not utilize the services of the express agency or motor common carriers, with charges of $1.80 and $3 each, respectively, for the same shipments.

Evidence was submitted on behalf of the express agency as to the nature and extent of the service rendered by it in the involved territory. It holds itself out to transport a wide variety of commodities, many of which are not proposed to be transported by applicant, and, for all practical purposes, it prescribes no size and weight limitations. It is, of course, thoroughly experienced in the handling of small packages and is well equipped to do so. It provides pickup service in Chicago, and in certain adjacent communities, upon request, and provides regularly scheduled pickups where the volume of traffic offered is sufficient to justify such a service. Within the territory here involved, it provides direct deliveries to consignees at all major points and at a number of smaller points. The great bulk of its traffic is handled on rail passenger trains and at rail passenger speeds. For the most part, its delivery service is limited to points at which rail stations are maintained, but it holds itself out to serve all points in the considered territory through the medium of a "bill to" directory, which establishes, for points not served, a listing of the next closest service point. As to the many service points at which it does not provide delivery to consignee, the consignee is required to pick up his merchandise at the express office after arrival notification by phone or mail. Consignees at non-service points are similarly notified, usually by post card, of the arrival of their packages at the nearest "bill to"

point. The company representatives indicate that the type of traffic here involved, which is referred to as "commercial" traffic, is desirable from a revenue standpoint, and is necessary to support the many other services provided which applicant does not propose to conduct.

Certain exhibits were submitted by the express agency to show the extent to which the present revenues of the company would be affected by the institution of the service proposed. One of such exhibits consists of a tabulation of traffic received from 25 Milwaukee shippers, which supported an application by an affiliated company to institute intrastate operations of the type here proposed out of Milwaukee, for the months of October, 1954 (prior to the institution of the service), and October, 1955 (subsequent thereto). The exhibit purports to show that the express agency suffered a substantial loss of business out of Milwaukee after the institution of the service. An examination of the exhibit, however, clearly indicates that no such conclusion is warranted. Of the 25 shippers listed, 15 made no use of the service of the express company during October, 1954, for shipments weighing less than 40 pounds,[2] and hence no business was lost in respect to such accounts. Of the remaining 10 shippers, all of which are shown to have offered the express company fewer shipments in October, 1955, than in October, 1954, 4 are shown to have decreased their express shipments to points in areas not served by the affiliated company to the same or greater extent than the decrease in shipments offered within the territory served; 3 others are shown to have substantially decreased the number of shipments to points beyond the territory served by the affiliated company; and only three are shown to have decreased the number of shipments within the territory served by the affiliate while maintaining a constant number of shipments to points beyond such territory. Of the latter three, two are shown to have

[2] The Wisconsin authority of applicant's affiliate is limited to shipments weighing up to 40 pounds each.

decreased the number of shipments offered to the express company by nine for the entire month, and the other by 38 shipments. There is nothing whatever to indicate that any of this traffic was diverted to applicant's affiliate, or that the latter was even serving any of the listed shippers in October, 1955.

Another exhibit, which is based upon total revenue on traffic moving from Chicago to four selected points in Wisconsin, three in Michigan, four in Indiana, and the three Iowa points here involved during a one-week period in April, 1955, purports to show a possible loss of 9.4 percent of such revenue if the instant application is granted. This exhibit is broken down into shipments with weights from 1 to 50 pounds, and so-called lot shipments which, although weighing more than 50 pounds, would produce an average weight of 50 pounds or less per package. In the opinion of the examiner, the inclusion of the latter group of shipments in the exhibit is unwarranted. Without such shipments, there is shown a possible loss of 7.18 percent. Another exhibit, similarly constructed, shows the revenue received from traffic moving from Chicago to all "salaried offices" of the express company in the extended territory here involved during April, 1955, and purports to show a possible loss of revenue upon the granting of the authority here sought in the amount of $97,000 a month. By eliminating the revenue received from the so-called lot shipments, which weighed more than 50 pounds, there is indicated a possible loss per month of $77,900 or about 7.2 percent. It is admitted that these are outside possibilities since there are included in both of such exhibits shipments which exceed the size limitations proposed by applicant, collect shipments, which applicant does not propose to handle, and retail deliveries, although an attempt was made to exclude deliveries for certain of the large well-known retail establishments served.

There is no evidence of record concerning the nature and extent of the services, if any, which the numerous

opposing motor carriers are now performing, within the scope of the application, or their willingness and ability to perform the service here proposed. As heretofore indicated, most, if not all, of such carriers have established a minimum charge of $3, applicable on shipments of 100 pounds or less, which acts as an effective embargo on individual shipments of small packages, and which indicates a definite disinterest in such traffic.

On brief, the opposing motor carriers and the express agency raise a number of legal and technical questions concerning the status of the proposed operation and the general effect thereof on the national transportation picture. Their representations in this respect are based largely upon the documentation procedures and modus operandi of the Illinois corporation in its present intrastate operations out of Chicago, and the announced intention of applicant to continue existing practices as far as possible in performing the operation for which authority is here sought. For the purposes of the following discussion the examiner will assume that applicant and the Illinois corporation are one and the same, and that the operation proposed will be conducted as an extension of the present intrastate operation out of the Chicago area. Reference to applicant will mean either applicant or the Illinois corporation, depending upon the circumstances, unless otherwise specifically indicated.

The principal question raised is that concerning the status of the proposed operation, that is, whether it will be that of a common carrier or of a contract carrier by motor vehicle as those terms are defined in the act. The basic determining factor, of course, is the nature of the holding out. Here, applicant proposes to hold itself out to the general public to engage in the transportation of a definite class of property, and it proposes to serve all shippers desiring to utilize its service. In the opinion of the examiner, such a holding out compels a finding that the proposed operation will be that of a common carrier by

motor vehicle, and it is immaterial that applicant now requires its 1,300 regular customers in the Chicago area to execute a service authorization agreement which sets forth the conditions of carriage. As a common carrier, applicant will be required to file with this Commission and keep open for public inspection tariffs showing all rates and charges for transportation and all services in connection therewith, and it will not be permitted, by individual contract or otherwise, to charge or collect or receive any greater or less or different compensation than that provided for in its published tariffs.

The opposing carriers question certain of applicant's present practices, including the charging of a fixed amount weekly for scheduled pickup service, the limitation of liability for loss or damage, the assessment of charges on a package and weight basis without regard to the classification of the contents, the failure to observe packaging requirements now maintained by other motor common carriers in the territory, and the failure to utilize appropriate documentation in respect of the shipments transported. In the opinion of the examiner, these objections are premature. As stated above, if applicant is granted a certificate it will be expected to publish and maintain reasonable rates and charges for all services performed. It will also be required to comply with all Commission regulations concerning the documentation of shipments, and it will not be permitted to limit its common-carrier liability for loss or damage without the approval of the Commission. Applicant proposes to conduct its operations in strict compliance with all applicable rules and regulations of the Commission and has indicated an intention to seek the advice of the Commission's Bureau of Traffic prior to publishing its initial tariff. The mere granting of the common-carrier authority sought will not bestow upon applicant any rights and privileges repugnant to its status as a common carrier and such action cannot be considered as granting Commission approval for the continuation of any present practices which might be

objectionable. There is no reason to believe that applicant cannot publish a tariff which will meet Commission requirements or that it cannot revise its documentation procedures in such a manner as to meet all applicable rules and regulations.

In the opinion of the examiner, the record establishes an urgent need on the part of the shipping public for a small-package service such as that proposed and which is now effectively available only through the medium of the Parcel Post system. Clearly, there is nothing of record to indicate that the opposing motor common carriers are willing or able to provide the service shown to be required. The express agency professes to be in a position to handle all small-package business offered, but it does not serve many points in the territory involved, does not provide delivery service at many of the points served, and has set up what amounts to an embargo on sma. package shipments by the establishment of a minimum rate of $1.80. This is not a rate proceeding and no attempt is made to question the reasonableness of this minimum rate. It is abundantly clear, however, that the establishment of such rate has driven a substantial portion of the small-package business away from the express agency and into Parcel Post channels, where it will remain unless shippers of small packages are provided with a motor common carrier service such as that proposed. The express company is well aware that the establishment of the minimum rate has resulted in a substantial loss of business and its continued maintenance thereof must be considered as affecting its willingness to handle the type of traffic subject thereto. Moreover, there is no convincing evidence that the institution of the proposed service will result in any great diversion of traffic from the express company or will materially affect its overall operations. As seen, the supporting shippers make only a limited use of express service within the scope of the instant application, and the conclusion is inescapable that the great majority of the traffic which applicant expects

to obtain in the proposed service is traffic which is now moving by Parcel Post.

With minor exceptions, the support for the application comes from shippers whose places of business are in Chicago or within the commercial zone thereof, and the examiner is unable to find any real and substantial need for extending the proposed service to shippers within 50 miles of Chicago. There is no representation at all from shippers in many of the large communities encompassed within the proposed 50-mile area. Further, there appears no proper justification for granting a destination territory extending substantially beyond the limits of Parcel Post zones 1 and 2.

There remains for consideration the question of whether applicant may hold, consistently with the public interest, both the certificate here sought and the permit which it now holds. In an attempt to minimize the opportunity for engaging in the practices which section 210 of the act is designed to prohibit, applicant has offered to amend its present permit so as to restrict the service authorized to one strictly in retail-store delivery service, for Cincinnati retail stores, between such stores, on the one hand, and, on the other, the customers of such stores in Kentucky and Indiana. The proposed amendment would, to a considerable extent, restrict the common-carrier and contract-carrier services to different classes of shippers, but would not, in the opinion of the examiner, eliminate completely the opportunity for objectionable practices. For example, applicant would still be in a position to serve a firm such as Sears Roebuck & Co., as a contract carrier in respect to retail deliveries out of Cincinnati, and also as a common carrier in respect of wholesale deliveries from Chicago to its numerous branches in Indiana. There is no indication of record that applicant proposes any discriminatory or preferential practices, but the mere opportunity for such practices is sufficient to warrant a refusal to relax the prohibitive provisions of section 210 of the act.

Report of the Examiner.

Upon consideration of all of the evidence of record, the examiner finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle (1) of general commodities, except those of unusual value, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, and those requiring special equipment, from Chicago, Ill., to Davenport, Clinton, and Dubuque, Iowa; points in and west of Muskegon, Kent, Barry, Calhoun, and Branch Counties, Mich.; points in that part of Indiana on and north of a line beginning at the intersection of U. S. Highway 36 and the Indiana-Illinois State Line and extending along U. S. Highway 36 through Indianapolis, Ind., to junction Indiana Highway 67 near Pendleton, Ind., thence along Indiana Highway 67 through Muncie, Ind., to Portland, Ind., and thence along Indiana Highway 26 to the Indiana-Ohio State line; points in that part of Illinois on, north, and east of the line beginning at the intersection of U. S. Highway 36 and the Indiana-Illinois State Line and extending along U. S. Highway 36 through Decatur, Ill., to Springfield, Ill., thence along Illinois Highway 97 to Galesburg, Ill., thence along U. S. Highway 150 to Moline, Ill., and thence along the Mississippi River to the Illinois-Wisconsin State line; and points in that part of Wisconsin in and east of Rock, Dane, Dodge, and Fond du Lac Counties, Wis., and (2) of returned shipments of the same commodities, which applicant has previously delivered, from the above-specified destination points to Chicago, over irregular routes in each instance, and subject to the following restrictions: (a) No service shall be rendered in the transportation of any package or article weighing more than 50 pounds or exceeding 108 inches in length and girth combined, and each package or article shall be considered as a separate and distinct shipment, and (b) no service shall be rendered between retail stores and the branches or warehouses of such stores; or

between retail stores and the branches and warehouses thereof, on the one hand, and, on the other, the premises of the customers of such stores.

The examiner further finds that applicant is fit, willing, and able properly to perform such service and to conform to the provisions of the act and the rules and regulations of the Commission thereunder; that a certificate authorizing such service should be granted upon the coincidental cancellation of that portion of applicant's present permit in No. MC-13426 authorizing operation to and from points in that part of Indiana in respect of which a grant of common-carrier authority is herein recommended; and that in all other respects the application should be denied.

In view of the findings herein, it is recommended that the appended order be entered.

By FRANK R. SALTZMAN, Examiner.

(Signature) FRANK R. SALTZMAN.

Report and Order of Division 1 of the Interstate Commerce Commission.

Recommended by FRANK R. SALTZMAN, Examiner.

(Signature) FRANK R. SALTZMAN.

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of A. D. 1956.

No. MC-115495

UNITED PARCEL SERVICE, INC., COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered: That upon full compliance with the requirements of sections 215 and 217 of the Interstate Commerce Act, and with our rules and regulations thereunder, and upon receipt from applicant of a request in writing for the coincidental cancellation of a portion of its outstanding permit in No. MC-13426, as indicated in said report, a certificate be issued to applicant authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities described, and in the manner described, in the findings in the said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION

No. MC-115495

UNITED PARCEL SERVICE, INC.[1] COMMON CARRIER APPLICATION

Decided September 24, 1956.

1. Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of general commodities, with exceptions, from Chicago, Ill., to Davenport, Dubuque, and Clinton, Iowa, and to points in specified portions of Illinois, Indiana, Wisconsin, and Michigan, over irregular routes, subject to certain restrictions.
2. Holding by applicant of the certificate granted herein and of presently held permit found to be consistent with the public interest and the national transportation policy. Dual operations approved.
3. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

---

[1] The name of applicant prior to the hearing and amendment was United Parcel Service of Cincinnati, Inc.

Report and Order of Division 1 of the Interstate Commerce Commission.

S. Harrison Kahn, Bernard G. Segal, Irving R. Segal, and Preston Davis for applicant.

Robert E. Des Roches, John P. McMahon, L. H. Ristow, Carl L. Steiner, Edward G Bazelon, Glenn W. Stephens, Richard F. Hahn, Fulmer Long, Elmer F. Slovacek, Eugene L. Cohn, Judson R. Robb, Walter F. Jones, Jr., Robert H. Levy, and Bernard G. Colby for protestants and interveners in opposition to the application.

H. L. Shaffer for Dubuque Packing Company.

Report of the Commission.

Division 1, Commissioners Tuggle, Minor and McPherson

By Division 1:

Exceptions were filed jointly by opposing motor carriers and motor carrier associations,[2] and separately by the Railway Express Agency, Inc., to the order recommended by the examiner and applicant replied.

---

[2] Advance Transportation Company, Austgen Express & Storage Company, Central Wisconsin Motor Transport Company, Checker Express Company, Commercial Truckers, Cushman Motor Delivery, Lavery Transportation, Inc., Fred Olson & Son Motor Service Co., Royal Transit, Inc., J. L. Scheffler Forwarder, Inc., Webber Cartage Line, Inc., West Shore Transport Company, Inc., Yule Truck Lines, Associated Truck Lines, Inc., Central Wisconsin Motor Transport, Clairmont Transfer Company, Gateway Transportation Company, Green-Bay Chicago Lines, Motor Transport Company, Neuendorf Transportation Company, Olson Transportation Company, Robertson Transportation Company, Great American Transport, Inc., Holland Motor Express, Inc., Interstate Motor Freight System, Michigan Motor Freight Lines, Inc., Red Star Transit Company, Inc., Wolverine Express, Inc., Chicago Suburban Motor Carrier Assoc., Inc., and Motor Carriers Central Freight Association.

Report and Order of Division 1 of the Interstate Commerce Commission.

By application filed August 4, 1955, as amended, United Parcel Service, Inc., of Cincinnati, Ohio, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, (1) of general commodities, except those of unusual value, dangerous explosives, household goods as defined by the Commission, commodities in bulk, those requiring special equipment, and those injurious or contaminating to other lading, from Chicago, Ill., and points in Illinois and Indiana within 50 miles thereof, to Davenport, Dubuque, and Clinton, Iowa; points in Allegan, Barry, Berrien, Branch, Calhoun, Cass, Eaton, Ingham, Jackson, Kalamazoo, Kent, Muskegon, Ottawa, St. Joseph, and Van Buren Counties, Mich.; points in Adams, Allen, Benton, Blackford, Boone, Carroll, Cass, Clinton, DeKalb, Delaware, Elkhart, Fountain, Fulton, Grant, Hamilton, Hancock, Hendricks, Henry, Howard, Huntington, Jasper, Jay, Kosciusko, Le Grange, Lake La Porte, Madison, Marion, Marshall, Miami, Montgomery, Newton, Noble, Porter, Pulaski, Randolph, St. Joseph, Starke, Steuben, Tippecanoe, Tipton, Wabash, Warren, Wayne, Wells, White, and Whitley Counties, Ind.; points in Boone, Bureau, Carroll, Champaign, Cook, DeKalb, De Witt, Du Page, Ford, Grundy, Henry, Iroquois, Jo Davies, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Logan, Macon, Marshall, McHenry, McLean, Ogle, Peoria, Piatt, Putnam, Rock Island, Sangamon, Stark, Stephenson, Tazewell, Vermilion, Whiteside, Will, Winnebago, and Woodford Counties, Ill.; and points in Brown, Calumet, Dane, Dodge, Fond du Lac, Jefferson, Kenosha, Manitowoc, Milwaukee, Outagamie, Ozaukee, Racine, Rock, Sheboygan, Walworth, Washington, Waukesha, and Winnebago Counties, Wis., and (2) of returned shipments of the same commodities, which applicant has previously delivered from the above-specified destinations to the above-specified origin points, over irregular routes in each instance, and

subject to the following restrictions: (a) *no service shall be rendered in the transportation of any package or article exceeding 50 pounds in weight or 108 inches in length and girth combined,* (b) each package or article shall be considered as a separate and distinct shipment and (c) no service shall be rendered in the transportation of such commodities as are sold by department stores and specialty shops between such stores and shops and their customers, or between such stores and shops and branches and warehouses thereof, or between such stores' or shops' branches and warehouses and such stores' and shops' customers. Numerous motor carriers, several motor carrier associations, and the Railway Express Agency, Inc., oppose the application.

The examiner recommended that authority be granted authorizing the transportation of general commodities, with certain exceptions, from Chicago to Davenport, Clinton, and Dubuque, Iowa, and to points in defined areas in Wisconsin, Michigan, Indiana, and Illinois as described in the appendix hereto, and of returned shipments to Chicago, subject to the restrictions indicated in such appendix and subject also to the cancellation of that portion of applicant's present permit in No. MC-13246 authorizing operation to and from points in that part of Indiana to or from which a grant of common carrier authority was recommended. No exceptions were filed to the recommended partial denial, and that phase of the application will not be further discussed. Exceptions to the recommended order of the examiner were filed jointly by the opposing motor carriers and motor carrier associations, and separately by the Railway Express Agency, Inc., which will hereinafter be referred to as the exceptions of the motor carrier group, and of the Railway Express, respectively.

In their exceptions the motor carrier group and Railway Express contend generally that the examiner erred in finding that the existing transportation services are inadequate

to meet the reasonable needs of the shipping public, and that public convenience and necessity require the proposed operation. Specifically, they contend that the examiner erred in concluding (1) that a need exists for the proposed service because the minimum charges of existing carriers are so high as to act as an embargo on small-package traffic, (2) that the proposed operation is common carriage, (3) that a grant of authority would have no adverse effect on existing carriers and would not accomplish any great diversion of traffic to the applicant and (4) that inquiries on brief regarding applicant's present practices are premature. The motor carrier group further maintains that the examiner failed to distinguish between applicant, a proposed applicant and the shareholders of a corporation, and erred in finding that the service proposed from Chicago to points in Illinois is in interstate commerce. The motor carrier group argues, in the alternative, that in the event the authority sought is granted, authorized movements should be restricted to points within the city limits of Chicago. In support of their position, the protestants and interveners argue that the lower rates which applicant proposes to charge in rendering the service controlled the opinion and conclusion of the examiner; that the execution by the supporting shippers of a service agreement, the limitation of liability for loss and damage, and the weekly service charge assessed for making pickup at shipper's establishment, are not characteristics of common carriage; and that the proposed service as restricted, is impractical and unworkable. In reply, applicant contends that the evidence of record adequately supports the grant of authority recommended.

The evidence adduced, the examiner's recommendation, and the exceptions and reply have been considered, and we find that the examiner has adequately stated the facts in his recommended report. We adopt such statement as our own. However, some of the more important facts will be summarized briefly here as a background for discussion of the exceptions.

Report and Order of Division 1 of the Interstate Commerce Commission.

Applicant is affiliated with a number of commonly controlled corporations operating in a number of the principal cities and environs of the United States under the "United Parcel Service" name. They provide two types of specialized parcel delivery service for manufacturers, for wholesalers, and distributors to their customers and for retail and department stores to their customers, which will hereinafter be referred to as the wholesale service and the retail service, respectively. In rendering such services, they provide a daily pickup, and make next-day deliveries at costs comparable to parcel post charges. The instant applicant holds no motor common-carrier authority from this Commission. It does hold, however, a permit No. MC-13426, authorizing the transportation (1) of such commodities as are sold by department stores between Cincinnati and certain points in Kentucky and (2) of new furniture and household furnishings between Cincinnati and points in Kentucky and Indiana, with the service in both instances, restricted to one performed under separate and individual contracts or agreements with persons who operate retail department stores and specialty shops. In addition, it holds intrastate common carrier authority from the Public Utility Commission of Ohio to conduct a wholesale and retail delivery service, as previously described, radiating from Cincinnati.

So far as here pertinent, applicant is under common control with United Parcel Service of Illinois, Inc., of Chicago, which holds intrastate authority from the Illinois Commerce Commission to conduct a wholesale and retail delivery service radiating from Chicago, and performs a wholesale and retail package delivery service in interstate commerce within the Chicago commercial zone. This affiliate of applicant's operating in the Chicago area has developed an elaborate system for handling large volumes of small parcels, which has proved both efficient and economical for shippers thereof. In its wholesale operation

in the Chicago area this affiliate serves 1,300 consignors, handling approximately 15,000 small parcels daily at rates comparable to parcel post. The United Parcel Service of Milwaukee, Inc., and United Parcel Service of Cleveland, Inc., are affiliated companies performing similar operations out of Milwaukee and Cleveland, respectively. It is proposed to merge these two companies and the Illinois corporation into applicant. By the instant application, applicant here seeks to obtain authority to operate in the territory in which the Illinois corporation provides intrastate common carrier service and adjoining areas in other States as previously described.

The application was supported by 41 representatives of manufacturers, distributors and wholesalers of various commodities shipping to points in the destination territory. Their testimony is similar and will be considered next. Collectively these shippers are engaged in producing and distributing clothes, precision tools, toys, abrasives, phonograph records, pharmaceutical supplies, plumbing supplies and numerous other articles to their customers in the involved territory. They have occasion to ship a large number of small packages daily from points in the Chicago area to points in the destination territory. They use the service of applicant's affiliate at present principally for intrastate delivery of these small parcels which generally weigh under 50 pounds and average about 11 pounds a package, and supplement such service in the interstate areas with parcel post service. This latter service, however, has not been too satisfactory from the standpoint of service. In addition, the shippers have on occasion, used the services of Railway Express and motor carriers, but use of railway express service has been quite limited and motor carrier service has been restricted to movement of larger shipments. In this connection, in the territory here considered the Express Agency maintains a minimum charge of $1.80 per shipment and motor common carriers

a minimum charge of $3 per shipment. According to the shippers, these minimum charges for the movement of small parcels has prevented their use regularly. The shippers desire that applicant be authorized to deliver throughout the destination territory sought herein and they know of no motor carrier engaging in operations such as it performs operating throughout that area.

Despite their interest therein, we do not agree with the contention that the supporting shippers' desire for lower rates is the controlling factor in respect of their support. The record reveals that applicant's affiliates have developed a highly efficient system for the distribution of small parcels, and in order to render this type of service they have established rates on a level with the parcel post system. One of them is presently serving a large number of shippers in the Chicago area to the extent previously described, and parcels destined to points in the territory not served by this affiliate are in the main handled by mail. Although Railway Express is equipped to transport small packages, its participation has been limited to some extent, because of its inability to serve many points directly. The service of the opposing motor carriers has been limited to the movement of larger shipments. In this connection, it is significant that the latter did not introduce evidence concerning the nature and extent of the services which they are now performing from and to the points involved or their willingness and ability to perform the service here proposed. The limited participation of the opposing carriers in this traffic is further explained by the shippers' complaint that the minimum charges assessed by them for the delivery of small parcels prevents their use. It is true that a mere desire on the part of shippers for lower rates is insufficient justification for the authorization of additional motor carrier service, but the Commission in *Malone Freight Lines, Inc., Extension—Textiles*, 61 M. C. C. 501, pointed out that there is a real difference between rate

cutting, on the one hand, and, on the other, the use of rates as a means of avoiding the handling of traffic. The rates established by applicant and its affiliates in performing parcel-delivery service were not designed to divert traffic from existing express and motor carriers, but primarily to compete with the parcel post system for the distribution of small parcels. The minimum charges established by Railway Express and by the motor carriers on individual shipments have, to a large degree, had the same effect as an embargo on most shipments of small packages, and leads to the conclusion that the opposing carriers are not particularly interested in this traffic. It follows that a grant of authority herein to applicant will not cause any appreciable diversion of traffic from these carriers. These considerations rather than the matter of rates control the result herein.

As to the opposing carriers' contention that the proposed operations will not be common carriage, the evidence shows that applicant intends to hold itself out to the general public to engage in the transportation of a definite class of property, and proposes to serve all shippers desiring to utilize its service. Its affiliate serves 1,300 shippers in the Chicago area, and it is logical to assume that if applicant is authorized to take over and to perform the proposed operations in a wider territory, its service will be used by numerous shippers. We find no merit in this contention.

The objections raised on brief by protestants and interveners, reiterated on exceptions; to the existing practices of applicant's Illinois affiliate in performing intrastate operations are not determinative of the issues presented here. If applicant is granted authority, it will be required to comply with all applicable rules and regulations of the Commission and will not be permitted to engage in practices which are incompatible with its status as a common carrier. Applicant has evinced a willingness to comply strictly with such rules and regulations and to consult with

our staff in preparing its initial tariff. We are not convinced that it cannot operate in conformity with our requirements affecting motor common carriage and still render an efficient service responsive to the public need.

The contention relating to alleged confusion on the part of the examiner as to the identity of the applicant is not meritorious. The amendment made prior to the hearing deleting the words "of Cincinnati" from applicant's name did not change its identity. The evidence discloses that a merger of several companies into applicant, as previously discussed, is contemplated. The merger of the Illinois corporation into applicant, in particular, would be consonant with sound business practice and would be beneficial in conducting the proposed operations, and there is no reason to doubt that the common owners will take steps to effectuate such consolidation. As pointed out by the examiner, all of the companies, including applicant, are in good financial condition. A balance sheet of applicant as of September 30, 1955, shows total assets of $480,603, consisting of current assets $234,165 and carrier operating property $246,438. Liabilities consist of current liabilities $96,591 and advances payable $262,954. Capital stock amounts to $50,000 and surplus to $71,058. For the first 9 months of 1955, applicant had a net income of $15,125. It is fit and able, financially and otherwise, to perform the proposed operation.

The recommended grant of authority from Chicago to points in the described territory in Illinois is warranted. In this connection, a grant of authority to serve Chicago includes the right to serve points in Indiana in the Chicago commercial zone. See *Commercial Zones and Terminal Areas*, 54 M. C. C. 21. The evidence shows that shippers situated in the Indiana portion of the Chicago commercial zone need applicant's service. A restriction limiting the origin for the proposed service to the city limits of Chicago would be contrary to our long established practice, would

contribute to confusion and should not be imposed. The recommended grant of authority to points in the Illinois territory was made to enable applicant to serve these Indiana shippers in interstate service to points in the former State. Such authority also is needed where shipments are picked up on the same vehicle at Chicago which are destined to points in Illinois and Iowa or in Illinois and Indiana. In making such deliveries, applicant's vehicle may operate through Iowa or Indiana before completing its deliveries to points in Illinois.

The fact that applicant and its affiliates have operated successfully in performing services similar to that proposed herein demonstrates that the proposed operation is workable and practical. This matter does not warrant further extended discussion.

As indicated, the issuance of a certificate under the grant recommended by the examiner is conditioned upon the coincidental cancellation of that portion of applicant's present permit in No. MC-13426 authorizing operation to and from that part of Indiana in respect to which a grant of common carrier authority was recommended. Applicant did not object to such condition and it will be imposed herein. Applicant's contract carrier operations in interstate commerce are restricted to those under separate and individual contracts with persons who operate retail department stores and specialty shops, whereas one of the restrictions in the recommended grant, in effect, precludes common carrier service between such stores and their branches or warehouses and between such stores and warehouses and the premises of their customers. Moreover, the two operations involve different origin and destination points for each type of carriage. These factors collectively appear to prevent applicant from serving generally the same shippers in both contract and common carriage and eliminate opportunities for discriminatory or preferential practices.

Accordingly, approval of dual operations resulting from the grant herein is warranted.

We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of the commodities, from and to the points, and subject to the restrictions described in the appendix hereto.

We further find that the holding by applicant at the same time of the certificate authorized to be issued herein and of the permit heretofore issued to it will be consistent with the public interest and the national transportation policy.

We further find that applicant is fit, willing, and able, properly to perform such service and to conform to the requirements of the Interstate Commerce Act and to our rules and regulations thereunder; that an appropriate certificate authorizing such service should be granted conditioned upon a request in writing, by applicant for the cancellation of that portion of the permit issued in No. MC-13426 authorizing operation between Cincinnati and that part of Indiana to which a grant of common carrier authority is made herein; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, and with our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein.

Report and Order of Division 1 of the Interstate Commerce Commission.

Grant Recommended by the Examiner.

(1) General commodities, except those of unusual value, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, and those requiring special equipment, from Chicago, Ill., to Davenport, Clinton, and Dubuque, Iowa; points in and west of Muskegon, Kent, Barry, Calhoun, and Branch Counties, Mich.; points in that part of Indiana on and north of a line beginning at the intersection of U. S. Highway 36 and the Indiana-Illinois State line and extending along U. S. Highway 36 through Indianapolis, Ind., to junction Indiana Highway 67 near Pendleton, Ind., thence along Indiana Highway 67 through Muncie, Ind., to Portland, Ind., and thence along Indiana Highway 26 to the Indiana-Ohio State Line; points in that part of Illinois on, north, and east of a line beginning at the intersection of U. S. Highway 36 and the Indiana-Illinois State line and extending along U. S. Highway 36 through Decatur, Ill., to Springfield, Ill., thence along Illinois Highway 97 to Galesburg, Ill., thence along U. S. Highway 150 to Moline, Ill., and thence along the Mississippi River to the Illinois-Wisconsin State line; and points in that part of Wisconsin in and east of Rock, Dane, Dodge, and Fond du Lac Counties, Wis., and

(2) Returned shipments of the same commodities, which applicant has previously delivered, from the above-specified destination points to Chicago, over irregular routes in each instance.

Subject in both directions to the following restrictions:

(a) No service shall be rendered in the transportation of any package or article weighing more than 50 pounds or exceeding 108 inches in length and

girth combined, and for the purpose of this restriction, each package or article shall be considered as a separate and distinct shipment, and,

(b) No service shall be rendered between retail stores and the branches or warehouses of such stores; or between retail stores and the branches and warehouses thereof, on the one hand, and, on the other, the premises of customers of such stores.

Order of the Full Commission.

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1 held at its office in Washington, D. C., on the 24th day of September, A. D. 1956.

No. MC-115495

UNITED PARCEL SERVICE, INC., COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

Order of the Full Commission.

Order.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23rd day of January, A. D. 1957.

No. MC-115495

UNITED PARCEL SERVICE, INC., COMMON CARRIER APPLICATION

(Cincinnati, Ohio)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Railway Express Agency, Incorporated, protestant, filed November 7, 1956, for reconsideration and/or oral argument.

(2) Reply of applicant, dated November 27, 1956.

and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby, denied, for the reasons that (1) the record adequately supports the findings of division 1, and (2) no sufficient cause appears for reopening the proceeding for reconsideration or for oral argument.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 31 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 557

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervening-Defendant-Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL FOR NON-PROSECUTION UNDER RULE 14(2) OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

R. J. FLETCHER,
R. E. JOHNSON,
JAMES V. LIONE,
Counsel for Plaintiff-Appellant,
Office & P. O. Address,
219 East 42nd Street,
New York 17, New York.

FULMER LONG,
WILLIAM H. MARX,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 557

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervening-Defendant-Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL FOR NON-PROSECUTION UNDER RULE 14(2) OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

No Motion to Dismiss the Appeal was made below.

Statement as to the Motion.

The notice of appeal was filed August 15, 1957. The record upon which the appeal is taken was forwarded to the Clerk of the Supreme Court of the United States September 27, 1957. On October 8, 1957 there were for-

warded to the Clerk of the Supreme Court of the United States (1) 40 copies of appellant's Statement as to Jurisdiction; (2) original appearances on behalf of attorneys R. J. Fletcher, James V. Lione and R. E. Johnson; (3) certificate of service of the said Statement as to Jurisdiction executed by James V. Lione.

On October 9, 1957, Fulmer Long, attorney having the principal responsibility for the appeal on behalf of appellant, went to Chicago in connection with a case pending in the United States Circuit Court of Appeals for the Seventh Circuit and from there said Fulmer Long went on his annual leave (see affidavit of Fulmer Long appended hereto).

On October 9 the Clerk of the Supreme Court of the United States wrote R. J. Fletcher, Vice President and General Counsel of appellant advising:

> "Your letter of October 8, together with the items listed therein, has been received. Before the above case can be docketed, this office must receive your check for $100.00, payable to 'Clerk, U. S. Supreme Court', to cover the docketing fee."

The Clerk's letter of October 9, 1957 arrived at the office of R. J. Fletcher October 11, but in the absence of the attorney having primary responsibility for the case, the importance thereof was overlooked and docketing fee was not paid until October 17 when the case was docketed, three days subsequent to the expiration of the sixty day period for docketing.

ARGUMENT.

The inadvertent three day delay in payment of the docket fee does not preclude jurisdiction.

Appellant has been diligent in prosecuting the appeal. The only lapse has been the unintentional and inadvertent three day delay in the payment of the docket fee. Rule 14(2) of the Revised Rules of the Supreme Court of the United States is discretionary. In fact, as the Supreme Court said in *United Public Workers* v. *Mitchell*, 330 U. S. 75 at 85:

> "Even after dismissal for failure to docket the rule permits this Court to allow the appellant to docket."

The issues in the appeal are important to the public and the transportation industry. The adjudication thereof, should not be precluded by a procedural technicality.

The payment of the docket fee on October 17 rather than on October 14 does not broaden the appeal or change the issues raised therein or adversely affect the appellees.

As set forth at pages 18 and 19 of the appellant's Statement as to Jurisdiction the issues are important to the transportation industry and to the proper administration of Part II of the Interstate Commerce Act. It is earnestly urged that in the interest of justice the issues be resolved in this litigation. Compare *Georgia Lumber Co.* v. *Compania*, 323 U. S. 834, 336.

Conclusion.

Wherefore, it is respectfully prayed that the motion to dismiss made by intervening defendant appellee under Rule 14(2) of the Revised Rules of the Supreme Court of the United States be denied, and that such further relief be granted appellant as appears appropriate.

Respectfully submitted,

R. J. Fletcher,
R. E. Johnson,
James V. Lione,
Counsel for Plaintiff-Appellant.

Fulmer Long,
William H. Marx,
Of Counsel.

APPENDIX.

Affidavit of Fulmer Long.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:
CITY OF NEW YORK

FULMER LONG, being duly sworn, deposes and says:

1. That he is the General Solicitor of plaintiff-appellant, Railway Express Agency, Incorporated, in case having Docket No. 557, October Term 1957, and is primarily responsible for the appeal in said case.

2. That he is informed by the Office of the Clerk of the United States District Court for the Southern District of New York that the record upon which the appeal was taken was forwarded to the Clerk of the Supreme Court of the United States September 27, 1957.

3. That on October 8, 1957, deponent caused to be forwarded to the Clerk of the Supreme Court of the United States (1) 40 copies of appellant's Statement as to Jurisdiction; (2) original appearances on behalf of attorneys R. J. Fletcher, James V. Lione and R. E. Johnson; (3) certificate of service of the said Statement as to Jurisdiction executed by James V. Lione.

4. That on October 9, 1957, deponent went to Chicago, Illinois in connection with a case pending in the United States Circuit Court of Appeals for the Seventh Circuit and thence went on his annual leave from which he returned to his office October 25, 1957 upon receipt of information that (1) he had overlooked the payment of the docket fee, (2) the Clerk of the Supreme Court of the United States had on October 9, 1957 addressed a letter to R. J. Fletcher, Vice President and General Counsel of appellant, advising

of the need of the payment of the docket fee, (3) the importance of the letter had been overlooked, (4) the docket fee was paid October 17, 1957, (5) the case was docketed October 17, 1957, and (6) motion dated October 16, 1957 had been made to dismiss the appeal for non-prosecution because of failure to docket.

Deponent believes that appellant has a good and meritorious case on appeal and that the issues are of sufficient importance to the public to warrant a final determination on the merits.

FULMER LONG.

Sworn to before me this 30th day of October, 1957.

MARCUS M. CURRY
NOTARY PUBLIC, State of New York
No. 60-0830250
Qualified in Westchester County
Term Expires March 30, 1959

Office - Supreme Court, U.S.
FILED
NOV 29 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 557.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *et al.*,
Defendants-Appellees.

On Appeal From the United States District Court
for the Southern District of New York

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

R. J. FLETCHER,
R. E. JOHNSON,
JAMES V. LIONE,
Attorneys for Plaintiff-Appellant,
Office & P. O. Address
219 East 42nd Street,
New York 17, New York.

FULMER LONG,
WILLIAM H. MARX,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 557.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION; *et al.*

On Appeal From the United States District Court for the Southern District of New York

---

BRIEF IN OPPOSITION TO MOTIONS BY THE SOLICITOR GENERAL AND BY INTERVENOR, UNITED PARCEL SERVICE, INC., TO DISMISS APPEAL PURSUANT TO RULE 16(1)(c) OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Statement.

The Solicitor General and United Parcel Service, Inc. (hereinafter referred to as United Parcel) attempt to dispose of this case on three asserted grounds, namely,

(1) that the issues raised in the Statement as to Jurisdiction were not raised below (see pages 5 and 6 of the motion of the Solicitor General, and page 6 of United Parcel's motion);

(2) that the legality of the tariff device may not be decided in a proceeding brought to secure a motor carrier certificate under Section 207 of the Interstate Commerce Act (see pages 6-9 of the motion of the Solicitor General and pages 4-6 of United Parcel's motion); and

(3) appellant has not challenged the main and subsidiary findings which support the order of the Commission* (see pages 4 and 5 of the Solicitor General's motion and pages 3, 4, 7 and 8 of United Parcel's motion).

ARGUMENT.

(a)

It was urged below that the tariff device was unlawful and that it vitiated the essential findings of (1) convenience and necessity and (2) ability to furnish the service proposed.

There is implied in United Parcel's argument (pages 5 and 6 of its motion to affirm) that appellant attacked the validity of the tariff device only after the certificate proceedings had been concluded, and after the tariff had been filed. Such is not the case. The attack was made throughout the certificate proceedings.

At the very beginning of the certificate proceedings question arose as to the materiality of the testimony of United Parcel's Secretary and Director concerning United Parcel's low rates of which the weekly charge for pickup once each business day regardless of need was the heart.

---

* The General Solicitor concedes that appellant has urged "that United Parcel failed to prove its ability to conduct the proposed operation 'without the unlawful tariff device'" (Solicitor General's motion, page 5).

When protestants objected to such testimony, counsel for United Parcel said (R. 382):

> "Mr. Examiner, the rates are not being offered, obviously, for approval of rates but they are, I may suggest, *basic to the case.*" (emphasis supplied)

The public witnesses were solicited on the basis of low rates competitive with Parcel Post (Exhibit 56, *R. 1344*, in evidence 1021, R. 521).

The only evidence in the record that United Parcel is able to furnish the service proposed at rates sufficiently low to attract business from Parcel Post and therefore that United Parcel is able to attract the volume upon which its ability to provide the service depends is its past experience (United Parcel's motion to dismiss, p. 7). But its past experience has been in connection with this same unlawful device of the $2.00 per week charge (R. 367, 432, 433, 992, A-40). In fact United Parcel had no plan other than that including the weekly charge for daily pickup regardless of need or demand (R. 436, 437).

The Examiner and the Commission accepted the observation of United Parcel's counsel that rates were "basic to the case". The Examiner said (A-18, 19):

> "Applicant's ability to provide the service proposed at rates sufficiently low to attract the business from the parcel post system is dependent upon its obtaining a large volume of business and upon it being able to handle such volume in an efficient and expeditious manner."

Division 1 of the Commission said in its report (A-37):

> "The record reveals that applicant's affiliates have developed a highly efficient system for the dis-

> tribution of small parcels, and *in order to render this type of service they have established rates on a level with the parcel post system.*" (emphasis supplied.)

The following amply establishes that appellant urged before the Commission and before the court below that absent the unlawful tariff device there was no substantial evidence supporting the basic findings of (1) convenience and necessity, and (2) ability to perform the service proposed.

In its Exception No. 4 to the Recommended Report and Order of the Examiner, appellant said (R. 83):

> "The Examiner erred in finding that inquiry into applicant's practices is premature in this proceeding; that the legality of such practices need not be determined in this proceeding and would not constitute a bar or obstacle to certification regardless of whether or not they might later be found to be inconsistent with or repugnant to the authority granted by certification."

In its argument on Exception No. 4 quoted immediately above appellant said (R. 94):

> "Certainly, it is indisputable that applicant, if certificated, will be required to file tariffs and to comply with all applicable rules. The essential question is whether upon compliance with all applicable rules and with the statute governing common carriers, *applicant will still be able to offer the low rates* which made its services attractive to shippers and *which convinced the Examiner that its service was needed.*"

In its petition to the Commission for reconsideration appellant said (R. 185-190):

"Both the Examiner and Division 1 *refuse* to find that applicant could operate lawfully and still perform the *service it proposed.* Rather, it is found that applicant could operate lawfully and still render 'an efficient service responsive to the public need.'

"This may or *may not* be true. It is *pure speculation,* unsupported by any evidentiary fact. It *assumes* that the support given this application *as proposed* would still be given if it were necessary to *change or amend* the character of service or the *rate structure* proposed.

• • • • • •

"It is of no significance that 'applicant has evinced a willingness to comply strictly' with the law. The question is: Can the operation which it proposed, the only operation here involved, be performed in strict compliance with the law? Can it produce that which it promised, that which gained it the support of public witnesses? If not, no certificate can issue."

In its complaint filed in the District Court appellant alleged (R. 3-5):

"VIII. The public witnesses whose testimony the Commission accepted as supporting its finding of public convenience and necessity were solicited by United Parcel and their testimony was based on the unlawful and unjustly discriminatory proposal of the United Parcel as is more particularly shown by the excerpts from the record in said Docket No. MC-115495 annexed hereto as Exhibit 'D'.

"IX. Plaintiff in its brief submitted after hearing, in its exceptions to the examiner's report, and in its petition for reconsideration in said Docket No. MC-115495 has urged (1) that the United Parcel proposal to charge $2.00 per week for pickup each

> business day regardless of need is unlawful and (2) that the public witnesses have been solicited on the basis of rates which are dependent upon the proposal or system, the heart of which is the $2.00 per week pickup service; and the Commission has declined to pass upon the validity of such provision, but nevertheless, has accepted as supporting its conclusions the assertive consequences of United Parcel System of which the pickup charge is the heart, such consequences including low rates to consignors of many shipments and a high rate to the shipper of but one shipment per week."

In its motion addressed to the court below for an order to amend the court's findings and to alter judgment appellant said (R. 1848, 1849):

> "Plaintiff does not urge that the rate itself is unlawful if the device is lawful. It does urge that the device of a weekly charge, whether it be $2.00 or $4.00 or any other sum, for pickup service per week is unlawful. And plaintiff urges further that because the device is unlawful there is no evidence of a lawful or proper operation which United Parcel is able to perform and which is convenient and necessary to the public."

(b)

Where low rates are "basic to the case", the validity thereof is also basic.

To permit the granting of a motor carrier certificate upon evidence of which low rates are basic, would be an open invitation to fraud if, when challenged, the applicant were not required to show that he could operate lawfully and successfully on the basis of such rates.

United Parcel at pages 7 and 8 of its brief urges that appellant has made "the unwarranted assumption through-

out its statement of jurisdiction that the exact tariff to which it objects is 'essential' to the United Parcel Service."

The testimony of the Secretary and Director of United Parcel, the only evidence on the subject, shows that United Parcel has no plan for rates and no experience other than that including the incentive $2.00 per week pickup charge regardless of need or demand (R. 367, 432, 433, 436, 437, 922). Therefore, there is no evidence in the record supporting ability to furnish the service proposed absent the unlawful $2.00 per week charge. See Point (b), page 14 of Statement as to Jurisdiction.

At the top of page 8 of its motion United Parcel makes the unwarranted assumption that "a practical alternative can and will be available" if the weekly charge for pickup service is unlawful. Since rates are "basic" protestants to United Parcel's application for a certificate are entitled to be heard on the question of the "practical alternative" in the certificate proceedings.

Like the Commission, counsel for the United Parcel apparently holds the view that protestants have the burden of showing that United Parcel lacks ability. See Point (c) on page 16 of appellant's Statement as to Jurisdiction. United Parcel having failed even to try to establish the contrary, the assumption is warranted that United Parcel cannot *lawfully* operate at rates competitive with Parcel Post. At least there is no evidence that it can compete rate wise with Parcel Post except with the unlawful device of a weekly charge for daily pickup service regardless of need. Appellant operating with lawful rates established on the basis of cost studies, is not and the truckers have not been able to compete rate wise with Parcel Post (R. 367-370) [See Ex Parte No. 185, *Increased Express Rates and Charges, 1953*, 289 I. C. C. 249 (1953)].

(c)

The validity of the tariff device should be decided in the proceeding here involved.

The Solicitor General at page 9 of his brief urges that appellant's remedy is in a further proceeding before the Commission under Section 216(e) of the Act, 49 U. S. C. 316(e). But under that section the right to a certificate may not be challenged.

Since the application for the certificate was granted on the assumption by the Commission that United Parcel required volume to operate successfully and that United Parcel could attract volume from Parcel Post by reason of its low rates competitive with Parcel Post, and since the only evidence in the record that United Parcel can compete rate wise with Parcel Post is based upon the unlawful device of the weekly charge for pickup service regardless of demand or need, it is respectfully submitted that the validity of that device should be determined in the certificate proceedings.

Conclusion.

WHEREFORE, it is respectfully submitted (1) that the motion to affirm by the Solicitor General, and the motion to affirm by Intervening Defendant-Appellee, United Parcel Service, Inc., be denied; and (2) that this case be referred back to the United States District Court for the Southern District of New York with instructions to annul or set aside the orders of the Interstate Commerce Commission, or to suspend said orders and remand the case to the Interstate Commerce Commission for a determination of the legality of the $2.00 per week pickup charge on the present record or upon the present record and such additional evi-

dence as may be received after reopening the case and for the denial of United Parcel's application in the event said tariff device of the $2.00 per week pickup charge is found unlawful.

Respectfully submitted,

R. J. FLETCHER,
R. E. JOHNSON,
JAMES V. LIONE,
Counsel for Plaintiff-Appellant.

FULMER LONG,
WILLIAM H. MARX,
of Counsel.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 17 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 557

RAILWAY EXPRESS AGENCY, INCORPORATED
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervening-Defendant-Appellee.

MOTION TO DISMISS APPEAL UNDER RULE 14(2) OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

BERNARD G. SEGAL,
IRVING R. SEGAL,
S. HARRISON KAHN,
JEROME J. SHESTACK,
Attorneys for Intervening-Defendant-Appellee.

Of Counsel:
SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pennsylvania.

October 16, 1957.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervening-Defendant-Appellee.

MOTION TO DISMISS APPEAL UNDER RULE 14(2) OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Now comes United Parcel Service, Inc., Intervening-Defendant-Appellee herein, and respectfully moves this Court pursuant to Rule 14(2) of the Revised Rules of the Supreme Court of the United States to dismiss the appeal in this action for non-prosecution and assigns therefor the following reason:

The fee for docketing the appeal has not been paid and the appeal has not been docketed in the Supreme Court

within sixty days after the filing of the notice of appeal as required by Rule 13(1) of the Revised Rules of the Supreme Court. No enlargement of the time for docketing has been granted.

BERNARD G. SEGAL,
IRVING R. SEGAL,
S. HARRISON KAHN,
JEROME J. SHESTACK,
Attorneys for Intervening-Defendant-Appellee.

Of Counsel:
SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pennsylvania.

October 16, 1957.

AFFIDAVIT

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

JEROME J. SHESTACK, being first duly sworn, says

1. The records of the United States District Court for the Southern District of New York show that notice of appeal from the judgment of the Court in Civil Action, Number 119-29, Railway Express Agency, Inc., et al. v. United States of America, et al. was filed on August 15, 1957.

2. I am informed by the Office of the Clerk of the Supreme Court of the United States that the fee for docketing the appeal has not been paid and the appeal which was noted had not been docketed in the Supreme Court as of 12:00 P. M. on October 16, 1957, which time is more than sixty days after the filing of notice to appeal.

3. Plaintiff as of October 16 failed to respond to notice from the Office of the Clerk of the Supreme Court of the United States of plaintiff's failure to complete the steps necessary for docketing.

4. The records of the United States District Court for the Southern District of New York and of the Office of the Clerk of the Supreme Court of the United States do not show that any application for enlargement of the time for docketing the case had been made.

5. A copy of the above Motion has this day been served upon all parties of record in this proceeding by mailing a copy thereof by prepaid registered mail.

/s/ JEROME J. SHESTACK.
Jerome J. Shestack.

Sworn to and subscribed before me this 16 day of October, 1957.

/s/ ERNESTINE G. LEWIS,
Notary Public.
My Commission expires: January 6, 1961.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 557

RAILWAY EXPRESS AGENCY, INCORPORATED, APPELLANT,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, appellees Interstate Commerce Commission and the United States of America, move that the judgment of the district court be affirmed.[1]

STATEMENT

This is a direct appeal from a final judgment entered on June 6, 1957, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing a complaint seeking to set aside an order of

[1] The opinion of the district court is now reported at 153 F. Supp. 738.

the Interstate Commerce Commission. The Commission's order granted the application of United Parcel Service, Inc. (United Parcel), for a certificate of public convenience and necessity pursuant to Section 207 (a) of the Interstate Commerce Act (49 U. S. C. 307 (a)) to perform restricted common carrier operations by motor vehicle over described irregular routes emanating from Chicago, Illinois (J. St. A 42–43). The order was predicated upon the finding that "present and future public convenience and necessity require operation by applicant [United Parcel], in interstate or foreign commerce, as a common carrier by motor vehicle * * *" (J. St. A 41). The Commission also found that the applicant "is fit, willing and able, properly to perform such service and to conform to the requirements of the Interstate Commerce Act and to our rules and regulations thereunder" (J. St. A 41).

After completion of the administrative procedure, appellant sought relief from a three-judge statutory district court. The court in a comprehensive decision (one judge dissenting) sustained the Commission's report and order (J. St. A 1–6).

ARGUMENT

Section 207 (a) of the Interstate Commerce Act (J. St. 3–4) authorizes the Commission to grant certificates of public convenience and necessity to applicants desiring to perform transportation by motor vehicle in interstate commerce, provided the Commission finds that the applicant is fit, willing and able properly to perform the service proposed and to con-

form to the provisions of Part II of the Act and the Commission's requirements, rules and regulations thereunder, and that the proposed service, to the extent authorized, is or will be required by the present or future public convenience and necessity.

The Commission made these statutory findings, which are similar to those made by the Hearing Examiner (J. St. A 27–28).[2] The findings were based upon subsidiary findings (J. St. A 37) that:

> The record reveals that applicant's affiliates have developed a highly efficient system for the distribution of small parcels, and in order to render this type of service they have established rates on a level with the parcel post system. One of them is presently serving a large number of shippers in the Chicago area to the extent previously described, and parcels destined to points in the territory not served by this affiliate are in the main handled by mail.[3]

---

[2] Since the Commission specifically adopted the facts as stated by the Examiner (J. St. A 34), his report (J. St. A 13–28) must be considered together with the report of the Commission (J. St. A 30–43).

[3] United Parcel sought a certificate of public convenience and necessity to serve a restricted segment of the shipping public. The application, as amended, was restricted so that:

"(a) *no service shall be rendered in the transportation of any package or article exceeding 50 pounds in weight or 108 inches in length and girth combined*, (b) each package or article shall be considered as a separate and distinct shipment and (c) no service shall be rendered in the transportation of such commodities as are sold by department stores and specialty shops between such stores and shops and their customers, or between such stores and shops and branches and warehouses thereof, or between such stores' or shops' branches and warehouses and such stores' and shops' customers" (J. St. A 33).

The type of business engaged in by the 41 shipper witnesses who supported the application (J. St. A 36) is indicative of the attractiveness of the proposed service.[4] The Commission pointed out that these shippers are engaged in producing and distributing clothes, precision tools, toys, abrasives, phonograph records, pharmaceutical supplies, plumbing supplies (J. St. A 36), "paper dress patterns" (J. St. A 20), and numerous other articles. The Examiner concluded that the record (J. St. A 25) "establishes an urgent need on the part of the shipping public for a small-package service such as that proposed and which is now effectively available only through the medium of the Parcel Post system."[5] Appellant does not challenge this

---

[4] The Examiner's report (J. St. A 18) set forth the eight features of the proposed service which are considered more attractive than Parcel Post, with which the proposed service is designed to compete. These are:

"(1) scheduled daily pickups are made at the premises of the consignor, (2) dependable next-day delivery is made in the entire area served, (3) written proof of delivery is obtained in all instances from the consignee, (4) facilities are provided for the prompt tracing of shipments, even in response to telephone calls, (5) prompt settlement of loss and damage claims is made without burdensome 'red tape' and delays, (6) personal checks are accepted in payment of C. O. D. charges, (7) when initial delivery cannot be made, subsequent deliveries are attempted, and refused or undeliverable shipments are returned to the consignor without additional cost, and (8) free insurance is provided within certain limits."

[5] The Commission recognizes that one of the major transportation problems requiring solution is the growing traffic in small package shipments and the necessity of developing an economical and efficient means of handling such shipments. See 70th Annual Report of the Interstate Commerce Commission, 1956, pp. 5–7.

conclusion and it remains uncontroverted. Appellant's petition for reconsideration by the Commission recognized the attractiveness of the proposed service which appellant called "imaginative," "ingenious," and "bold."

Despite the clear findings, based upon a voluminous record, of a need for the proposed service, appellant challenges the action of the Commission, not on the uncontroverted need for the service, but on the tenuous ground that United Parcel failed to prove its ability to conduct the proposed operation "without the unlawful tariff device." With respect to the finding of United Parcel's ability, financially and otherwise, to perform the proposed service, the Commission and the examiner have spelled out the basis therefor in detailed subsidiary findings (J. St. 9–10, A 15–A 17, A 19, A 39).* Without challenging these findings, appellant attempts, by focusing attention on tariff and rate matters, to convert a case concerning the certification of a new operation into a case to determine the lawfulness of rates, charges and practices. This is contrary

* In addition to the multi-million dollar assets of United Parcel as composed of its affiliates (United Parcel of Ohio, the nominal applicant, has assets of about one-half million dollars), the examiner noted that as of October 31, 1955, United Parcel had a total of 513 specially designed and equipped small panelled cars in operation which would be used in the proposed service (J. St. A 17). The Examiner further found that based upon its past experience United Parcel would have no difficulty in meeting the volume requirements of the proposed operation. He found that at the time of the hearing "the wholesale operation in the Chicago area was making daily pickups from 1,300 consignors and handling approximately 15,000 packages a day" (J. St. A 19).

to appellant's position before the Commission, when it charged that the evidence of the shippers supporting the application could not be considered since they were motivated by a desire for lower rates rather than a need for the service.[7] This is in accord with the Commission's long established practice, namely, that the Commission will not consider rates as pertinent in proceedings for operating authority since other sections of the act provide an adequate remedy pursuant to which their lawfulness can be tested.[8] *Wellspeak Common Carrier Application*, 1 M. C. C. 712; *Youngblood Extension of Operations—Canton, N. C.*, 3 M. C. C. 193; *Johnson Common Carrier Application*, 18 M. C. C. 194; *Omaha & C. B. Ry. & Bridge Co. Common Carrier Application*, 52 M. C. C. 207, 235; *Black Extension of Operations—Prefabricated Houses*, 48 M. C. C. 695, 709; *Pomprowitz Extension—Packing House Products*, 51 M. C. C. 343, 350.

---

[7] The Commission disagreed with this contention (J. St. A 37). Likewise, the court below held:

"But the Commission did not base its finding of convenience and necessity on the specific rate structure proposed by the applicant. On the contrary it found that neither plaintiff nor other carriers were meeting, or were fit, able and willing to meet, the shippers' needs for the particular service proposed by the applicant, and it expressly rejected the protestants' argument that the public witnesses favored the application out of a desire for lower rates" (J. St. A 6).

[8] In some instances, the Commission considers the evidence of rate stops and minimum charges, as in the instant case, as a significant factor indicating a lack of interest by competing carriers to provide a type of service shippers need and applicants propose to furnish. *Malone Freight Lines, Inc., Extension—Textiles*, 61 M. C. C. 501, sustained by a three-judge statutory court in *Atlanta-New Orleans Motor Freight Co., et al.* v. *United States, et al.*, 10 Fed. Carr. Cas. 2085 (1953).

We submit that appellant is inconsistent when it condemns as irrelevant to a case involving certification of new operations the shippers' testimony as based upon rate considerations, but urges that the Commission must consider in the certificate proceeding the rate practices of United Parcel, even before the Commission had determined that a need existed for the service and before United Parcel could file a tariff in compliance with the tariff publishing terms of Section 217 of the Act, 49 U. S. C. Section 317. The Examiner pointed out that appellant's attack on the rate practices of United Parcel was premature (J. St. A 24–A 25). The Commission, following its long established practice, declined to consider the tariff matter in the certificate proceeding and in so doing, stated (J. St. A 38–A 39):

> If applicant is granted authority, it will be required to comply with all applicable rules and regulations of the Commission and will not be permitted to engage in practices which are incompatible with its status as a common carrier. Applicant has evinced a willingness to comply strictly with such rules and regulations and to consult with our staff in preparing its initial tariff. We are not convinced that it cannot operate in conformity with our requirements affecting motor common carriage and still render an efficient service responsive to the public need.

The court below also recognized the inconsistent position taken by applicant. It said (J. St. A 4):

> While conceding that ordinarily rates are not a relevant factor in certificate proceedings, the

> plaintiff argues that the Commission's action in refusing to consider the validity of the $2.00 per week charge "was arbitrary and capricious and therefore the orders of the Commission should be set aside." We see nothing arbitrary in the Commission's action.

In support of this conclusion the court below relied upon this Court's opinion in *American Trucking Associations* v. *United States*, 326 U. S. 77, where, in sustaining the holding of the district court that the allegedly discretionary features of the applicant's rates were not properly in issue in a certificate proceeding, the Court stated (pp. 86–87):

> It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of § 217 of part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of § 220 of the same part to which the other motor carriers are subject. *These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.* [Emphasis added.]

The Court further pointed out that Section 204 (c) of the Act provides a method of objection to improper practices, such as unreasonable tariffs or irregular accounting, by motor carriers.*

---

* Section 204 (c) provides:

"Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant

After the Commission had denied appellant's final petition for reconsideration (J. St. A 44), United Parcel filed its tariff pursuant to the Commission's instructions (J. St. A 41) to become effective April 1, 1957. If appellant believes that the rate practices of United Parcel are unlawful, appellant may, as the court below said (J. St. A 4–A 5) obtain any relief to which it is entitled by filing a complaint with the Commission pursuant to Section 216 (e) of the Act, 49 U. S. C. Sec. 316 (e).[10] Thus, not only did appellant fail to exhaust its administrative remedy (*Director General of Railroads, et al.* v. *The Viscose Company*, 254 U. S. 498, 502–503), but it has failed to follow the prescribed administrative procedure for challenging rate practices (*Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752). Consequently, the case comes down to the question of whether or not the Commission properly determined the public convenience and necessity, a matter delegated by Congress to the administrative discretion of the Commission.

---

thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

[10] Section 216 (e) provides, in part:

"Any person * * * may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title. * * *."

Interstate Commerce Commission v. *Parker,* 326 U. S. 60, 65. The district court, in holding the Commission's action proper, said (J. St. A 6):

> * * * We think it apparent from the reports of the examiner and Division I that the certificate was granted to United Parcel on the basis of evidence showing a more efficient service, at a lower cost and of a type not presently offered to shippers.

Thus, we submit that the appeal does not raise any special or unusual circumstances which warrant a recanvassing of the record by this Court. *New England Divisions Case,* 261 U. S. 184, 203, 204; *Radio Corp.* v. *United States,* 341 U. S. 412, 415.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Assistant General Counsel,
Interstate Commerce Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1957

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
NOV 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 557.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervening Defendant-Appellee.

On Appeal From the United States District Court for the Southern District of New York.

MOTION TO AFFIRM.

BERNARD G. SEGAL,
1719 Packard Building,
Philadelphia 2, Pennsylvania,
Attorney for Intervening-Defendant-Appellee.

IRVING R. SEGAL,
JEROME J. SHESTACK,
1719 Packard Building,
Philadelphia, Pa.;

S. HARRISON KAHN,
726-34 Investment Building
Washington, D. C.,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 557.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervening-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM.

United Parcel Service, Inc., Intervening-Defendant-Appellee, pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed.

STATEMENT.

This is an appeal from the final judgment of a district court of three judges constituted pursuant to 28 U. S. C. §§ 2284, 2325, dismissing appellant's complaint which sought to set aside an order of the Interstate Commerce Commission granting a certificate of public convenience and necessity to Intervening-Appellee, United Parcel Service, Inc., (herein "United Parcel").

The history of this proceeding begins with the application of United Parcel to the Interstate Commerce Commission for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle of general commodities, with certain exceptions, over described irregular routes between Chicago, Illinois and certain points in Iowa, Illinois, Indiana, Wisconsin, and Michigan. After extensive hearings, at which 50 witnesses testified and 90 exhibits were received, the Examiner recommended that a certificate be granted. Division 1, in a comprehensive opinion, unanimously adopted the Examiner's recommendations and ordered the issuance of the certificate. In its report, Division 1 made the following requisite findings (J. St. A-41):

> "We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of the commodities, from and to the points, and subject to the restrictions described in the appendix hereto.
>
> "We further find that the holding by applicant at the same time of the certificate authorized to be issued herein and of the permit heretofore issued to it will be consistent with the public interest and the national transportation policy.
>
> "We further find that applicant is fit, willing, and able, properly to perform such service and to conform

to the requirements of the Interstate Commerce Act and to our rules and regulations thereunder; * * *"

Accordingly, the Division ordered the issuance of a certificate of public convenience and necessity to United Parcel.

Appellant thereupon filed a petition with the full Commission seeking reconsideration of the decision of Division 1. The entire Commission, upon consideration of the record, and good cause appearing, unanimously entered an order on January 23, 1957 that appellant's petition be denied for the reasons that "(1) the record adequately supports the findings of Division 1, and (2) no sufficient cause appears for reopening the proceeding for reconsideration or for oral argument." (J. St. A-44.)

Thereafter, United Parcel filed a tariff to become effective April 1, 1957. Appellant filed a request for the suspension of the tariff. The Commission refused to suspend, and the tariff went into effect by its terms on April 1, 1957. Appellant did not file any complaint against United Parcel's rates pursuant to Section 216(e) of the Interstate Commerce Act, 49 U. S. C. § 316(e).

On March 28, 1957, appellant commenced the present action in the United States District Court for the Southern District of New York, seeking the annulment of the Commission's order granting the certificate of public convenience and necessity. In its action appellant did not attack the ultimate findings of convenience and necessity and that applicant is fit, willing and able to properly perform the proposed service. Nor did appellant attack the subsidiary findings upon which the ultimate findings were based.[1] Rather, appellant challenged the United Parcel

1. Examples of specific findings by the Examiner, *none of which is here challenged* by appellant, are:

—that there is an "urgent need on the part of the shipping public for a small-package service such as that proposed" by Intervenor (J. St. A-25);

—that among the attractive features of the system are such factors as: "(1) scheduled daily pickups are made at the premises of the consignor, (2)

tariff, the validity of which the Commission had not passed upon in the certificate proceeding. Specifically, appellant's attack was leveled at the legality of one aspect of United Parcel's proposed tariff, the $2.00 weekly service charge contained in United Parcel's proposed rate schedule.

This charge is for a service whereby a United Parcel pickup driver calls automatically each day at a regularly scheduled time at the place of business of each subscribing shipper without regard to the size of his business or the volume or number of packages shipped.

The court below dismissed the complaint holding appellant had failed to exhaust the administrative remedy provided by the Interstate Commerce Act for challenging the legality of tariff provisions. The court also rejected appellant's contention that the Commission based its findings on evidence predicated on United Parcel's specific tariff, holding that the findings were based on evidence showing that United Parcel was fit, able and willing to meet the needs of shippers for the service proposed by United Parcel.

---

dependable next-day delivery is made in the entire area served, (3) written proof of delivery is obtained in all instances from the consignee (4) facilities are provided for the prompt tracing of shipments, even in response to telephone calls, (5) prompt settlement of loss and damage claims is made without burdensome 'red tape' and delays, (6) personal checks are accepted in payment of C. O. D. charges, (7) when initial delivery cannot be made, subsequent deliveries are attempted, and refused or undeliverable shipments are returned to the consignor without additional cost, and (8) free insurance is provided within certain limits" (J. St. A-18);

—that "there is nothing of record to indicate that the opposing motor common carriers are willing or able to provide the service shown to be required" (J. St. A-25) and

—that "there is no convincing evidence that the institution of the proposed service will result in any great diversion of traffic from the [Railway] express company or will materially affect its overall operations" (J. St. A-25).

ARGUMENT.

The decision of the court below is clearly correct under the provisions of the Interstate Commerce Act, the governing case law and long established administrative practice.

In this appeal appellant seeks to set aside the grant of a certificate of public convenience and necessity. But appellant's attack is not directed to the findings which form the basis of the Commission's grant of the certificate. Rather, appellant has chosen to attack a provision of United Parcel's tariff filed after the certificate proceeding had ended.

Appellant's basic contention is that the $2.00 service charge contained in United Parcel's tariff is unlawful and that United Parcel "should not have been certificated in the absence of a finding after a full hearing that the tariff device was lawful." (J. St. A-13.)

This contention totally ignores the provisions of Section 216(e) of the Interstate Commerce Act (49 U. S. C. § 316(e)) which precisely prescribes the procedure for challenging the legality of a tariff. Section 216(e) provides:

> "Any person • • • may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title. • • •"

That procedure appellant has not followed. The Examiner and the Commission, following long established practice,[2] held that appellant's challenge to the service charge was premature and refused to pass on the validity of the tariff provision in the course of the certificate proceeding.

---

2. See, e.g. OMAHA & C. B. RY. & BRIDGE CO. Common Carrier App., 52 M. C. C. 207 235 (1950); WELLSPEAK, COMMON CARRIER APPLICATION, 1 M. C. C. 712 (1937).

The court below properly held that the Commission's action in this respect was correct. Judge Swan pointed out that the granting of the certificate has not "deprived Railway Express Agency of opportunity to challenge the legality of United Parcel's rate schedule" pursuant to the above section. "Until this administrative remedy has been exhausted, complaint to the courts is premature." (J. St. A-5.) Accordingly, the legality of United Parcel's tariff is not a ground upon which appellants can base an argument against the grant of a certificate of convenience and necessity. *American Trucking Associations v. United States*, 326 U. S. 77, 86 (1945).

For the first time, appellant now contends that, absent the United Parcel tariff provision, United Parcel failed to prove its ability to operate the service proposed. Of course, this contention is merely another attempt to circumvent the statutorily prescribed method for challenging the tariff. Moreover, the contention is founded on the erroneous assumption that the Commission based its findings on this specific aspect of plaintiff's rates. The fact, however, is otherwise.

As Judge Swan stated (J. St. A-6):

> "* * * the Commission did not base its finding of convenience and necessity on the specific rate structure proposed by the applicant. On the contrary it found that neither plaintiff nor other carriers were meeting, or were fit, able and willing to meet, the shippers' needs for the particular service proposed by the applicant, and it expressly rejected the protestants' argument that the public witnesses favored the application out of a desire for lower rates. * * * We think it apparent from the reports of the examiner and Division I that the certificate was granted to United Parcel on the basis of evidence showing a more

efficient service, at a lower cost and of a type not presently offered to shippers."[3]

With regard to United Parcel's ability to perform the proposed service, appellant has wholly ignored the detailed basis for the Commission's finding of ability set forth in the subsidiary findings of the Examiner. (J. St. A-16, A-17, A-19, A-39, A-40).[4] Thus, for example, the Examiner found that United Parcel has "developed an elaborate system for handling of small parcels which has proved both efficient and economical" (J. St. A-19); that based upon its past experience United Parcel would have "no difficulty in meeting the volume requirement" of the proposed service (J. St. A-19); and that at the time of the hearing, the identical operation in the Chicago area "was making daily pickups from 1,300 consignors and handling approximately 15,000 packages a day" (J. St. A-19). The Examiner also set forth in detail the financial assets of United Parcel and the nature and extent of equipment which was to be utilized in the proposed service (J. St. A-16, A-17). None of those findings has been or could be challenged by appellant.

Appellant not only has ignored the findings on which the grant of the certificate was based, but has also made the unwarranted assumption throughout its statement of jurisdiction that the exact tariff to which it objects is "essential" to the United Parcel service. That assumption finds no support in the record, as was pointed out by the

---

3. The significance of securing the benefits of improved transportation was succinctly summed up by Mr. Justice Reed in *Interstate Commerce Commission v. Parker*, 326 U. S. 66, 67-70 (1944), as follows: "* * * Public convenience and necessity should be interpreted so as to secure for the Nation the broad aims of the Interstate Commerce Act of 1940. * * * [Since] on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers * * *, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue. *The public is entitled to the benefits of improved transportation* * * *." (Emphasis supplied.)

4. The Commission adopted the facts stated by the Examiner (J. St. A-34) and his report must therefore be considered together with the Commission's report.

Commission and by the court below. If for any reason United Parcel's tariff presently on file is properly challenged and found not feasible, a practical alternative can and will be available.[5] As stated by Division I of the Commission and quoted in part by the court below (J. St. A-4, A-38, A-39):

> "If applicant is granted authority, it will be required to comply with all applicable rules and regulations of the Commission and will not be permitted to engage in practices which are incompatible with its status as a common carrier. Applicant has evinced a willingness to comply with such rules and regulations and to consult with our staff in preparing its initial tariff. * * *"

Thus, no considerations of law or practicality call for any departure in this case from the Commission's long standing and uniform practice of passing on the validity of rates only by the statutory procedure established there for. The Commission and the court below in refusing to depart from such practice acted under clear and established principles.

---

5. Judge Murphy, dissenting, briefly summarized certain financial data as to United Parcel's intrastate operations and apparently concluded that if the service charge objected to were eliminated, the operation would not be economically feasible. The error of this analysis is obvious. If this service charge were abandoned, a different rate structure would be substituted, calculated to produce not less than the revenue realized under the present tariff. And no contention has been, or properly could be, made that the amount of revenue which would be realized under the present tariff would be inadequate to assure profitable operations under which United Parcel could meet the need which the Commission has found is not being met by appellant or by any other carriers.

CONCLUSION.

We respectfully submit therefore that the appellant has not presented any substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed.

BERNARD G. SEGAL,
Attorney for Intervening-Defendant-Appellee.

IRVING R. SEGAL,
JEROME J. SHESTACK,
S. HARRISON KAHN,
Of Counsel.